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WINNING THE MOOT COURT ORAL ARGUMENT: A GUIDE FOR INTRA- AND INTERMURAL MOOT COURT COMPETITORS

By Gerald Lebovits, Drew Gewuerz, and Christopher Hunker*

Chief Justice, Your Honors, and may it please the Court:

We represent all those whose lives were changed by moot court.

Chief Justice, we respectfully request two minutes for rebuttal.

In our time before the Court, we will argue that competing in moot court can be law school's best experience, especially when the student-advocate's goal is to succeed in competition.

First, moot court hones the most formative skills that law school can impart.

Second, moot court gives student-advocates unparalleled opportunities to advance their careers, whether or not they intend to litigate.[1]

Given moot court's benefits to student-advocates, to legal education, and to the profession, we ask this Court to consider our strategies for winning a moot court oral argument.[2]

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For nearly every law student, moot court[3] is a new, exciting, and unforgettable experience,[4] one rooted firmly in real-world advocacy. Moot court is the genesis of a legal

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[1] Michael V. Hernandez, *In Defense of Moot Court: A Response to "In Praise of Moot Court—Not!,"* 17 REV. LITIG. 69, 79 (1998); MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, ADVANCED LEGAL WRITING AND ORAL ADVOCACY: TRIALS, APPEALS, AND MOOT COURT 469 (2009) (arguing that moot court teaches "important skills in advocacy that will carry on into your practice *regardless of what type of practice you do*") [hereinafter MURRAY & DESANCTIS I]; John T. Gaubatz, *Moot Court in the Modern Law School*, 31 J. LEGAL EDUC. 87, 87 (1981) (explaining that moot court develops persuasion skills that prepare students to argue in any court).

[2] For a discussion in the style of oral argument extolling moot court's virtues, see Darby Dickerson, *In Re Moot Court*, 29 STETSON L. REV. 1217 (2000).

[3] "Moot" as in "moot court" is different from "academic." "Something 'academic' is no longer relevant. Something 'moot' is debatable. . . . Moot Court is offered by academia, and often sponsored by academicians, but

career that, regardless of practice area, requires excellence in advocacy. An excellent advocate is knowledgeable on the law, masterful in marshalling facts, skilled in the forensic arts, respectful of decorum, compliant with proper procedure, mindful of due process, fair with adversaries, devoted to the client, helpful to the court, honest with everyone, and, above all, persuasive.

The process of becoming an excellent advocate is a career-long journey that begins in law school's first-year legal-writing course. Legal-writing courses, which culminate in writing a moot court brief and conducting a moot court oral argument, teach students to think like lawyers, a skill fundamental to practicing law and a necessary attribute to the good administration of justice. That thought process requires first-year law students to read and write in a new language,[5] the language of the law. But instead of thinking, speaking, and writing in legal jargon, "thinking like a lawyer" involves understanding how asking and answering questions can address and resolve uncertainties and ambiguities.[6] Moot court, the highlight of every first-year legal-writing course, teaches students advocacy skills to solve legal problems.

Moot court enhances the three most important skills that law schools offer their students: starting an argument with a conclusion, differentiating fact from opinion, and organizing a legal argument by issue rather than by a chronological narrative of the facts. Moot court also teaches students professionalism and ethics, to apply law to fact, to structure and rank a legal argument by strength, and not to assert losing propositions. By giving law students opportunities to improve their legal writing, legal research, and oral advocacy in a competitive environment that prepares students for a competitive world, the moot court experience is unlike any other in law school. It is, perhaps, the law-school activity that most fully develops the skill every lawyer must possess: advocacy. Regardless of practice area, all lawyers must communicate in a way that advances their client's interests, whether in a courtroom or boardroom. Most important, moot court builds character. Every student competitor "will be a better lawyer, and a better person, because of the moot court experience."[7]

This article discusses the principles of a successful oral argument and offers strategies for success in a moot court competition, which we define as an appellate-advocacy competition.[8] The article is designed to help moot court advocates create and deliver a winning oral argument in the context of a moot court competition. The guidance in this article is based

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Moot Court covers debatable points, not irrelevant ones." Gerald Lebovits, *Problem Words and Pairs in Legal Writing—Part I*, 77 N.Y. St. B.J. 64, 64 (Feb. 2005).

[4] Amy E. Sloan, Foreword, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U. BALT. L. REV. 43, 43 (2005) ("Lawyers may recall their moot court experience with joy and exhilaration, terror and anguish, or anything in between, but no one forgets it.").

[5] Judith Wegner*, Better Writing, Better Thinking: Thinking Like a Lawyer*, 10 LEGAL WRITING: J. LEGAL WRITING INST. 9, 15 (2004).

[6] *Id.* at 14.

[7] Hernandez, *supra* note 1, at 78.

[8] We exclude as a non-moot court competition a trial, interviewing, counseling, or negotiating competition.

on what is effective most of the time in the highly subjective and often unfair world that is competitive moot court. For every five moot court judges, one will disagree with the advice in this article, and one will not notice the technique or care at all. But, we believe, three will notice, care, and agree. This article explains how to appeal to the majority of judges by providing step-by-step instruction to winning the oral round, beginning when the moot court problem is released and finishing post-oral argument.

Some have observed that teaching appellate advocacy is different from coaching a winning moot court team.[9] To the extent that they are right, this article teaches how to win a moot court competition.

I. INTRODUCTION TO MOOT COURT

To win at moot court, a student-advocate must appreciate its values and understand its detriments.

At most law schools, success in the first-year legal-writing program or in an internal, or intramural, moot court competition is the gateway that allows students to join the law school's Moot Court Board as a candidate or member and then to be selected to join an outside, or intermural, moot court team.

Moot court competitions, whether intramural or intermural, are not easy; nor are they intended to be. The hosting law school or bar association designs the competition to challenge the competitors in a number of ways, both obvious and subtle. An obvious challenge is to submit a timely written brief and deliver an oral argument under pressure. Other obvious challenges are working with teammates and confronting nervousness. But the more subtle challenges are the hardest of all.

For example, most competition hosts create problems based on imaginary opinions from trial or intermediate appellate courts and do not include a full trial record. These fact patterns, typically much shorter than full records, force advocates to organize an incomplete set of fictional facts into two distinct arguments—one for each speaker (because most competitions have two speakers for each side)—and often omit the nuanced details available from a full trial. This limitation, though, is logistically necessary in administering moot court competitions. Moot court judges need short fact patterns because, as busy professors, practitioners, and sitting judges, they have little time to study even the fact patterns and bench

[9] *See, e.g.*, William H. Kenety, *Observations on Teaching Appellate Advocacy*, 45 J. LEG. EDUC. 582, 582 (1995) ("I have become convinced that what I, and perhaps many others, have been teaching is really not Appellate Advocacy, but rather How to Win Law School Moot Court Competitions."); Michael Vitiello, *Teaching Effective Oral Argument Skills: Forget About the Drama Coach*, 75 MISS. L.J. 869, 882 (lamenting that "too many competitions reward style over substance"); Report and Recommendations of the Committee on Appellate Skills Training, Appellate Judges' Conf., Judicial Administration Div., Am. B. Ass'n, *Appellate Litigation Skills Training: The Role of the Law*, 54 U. CINN. L. REV. 129, 146 (arguing that moot court does not teach appellate advocacy and recommending that it do so). But the solution is simple. Law schools may offer separate courses in appellate advocacy and clinical classes in appellate advocacy without eliminating their involvement in moot court.

briefs the hosts prepare for them,[10] let alone a lengthy trial record, which contains massive amounts of detail irrelevant to the issues before the moot court. Moreover, those who draft the problem for a competition and participate in the scoring and judging—students, professors, and practicing attorneys, depending on the competition—also have no time to prepare and read 100-page factual records. This limitation is unique to moot court; practicing appellate attorneys are accustomed to reviewing comprehensive, lengthy, and full trial records. But moot court's unique difficulty—some might say negative—permits participants to focus closely on the competition's legal issues in formulating their arguments.

Also singularly difficult is that most moot court teams are composed of either two advocates who argue both sides of an issue or of teams of three, in which the "swing" argues both sides. This does not prepare students to argue from both sides of their mouths. Rather, it compels student-advocates to learn the opposing side's case thoroughly, making them better able to defend their positions and structure their affirmative points in a way that undercuts their adversary's position.[11] Through this difficult form of Devil's advocacy, advocates will see the flaws in their own positions and learn to think objectively, skeptically, and honestly.

Moot court topics, too, are difficult, often more difficult than some lawyers will ever handle during their careers. But the difficult, big-issue, and controversial topics that one sees in moot court require policy discussion along with legal reasoning, and they lead to impassioned advocacy and interactive learning.

Despite the benefits of moot court, it has some critics. Critics argue that moot court's rules and scoring methods, which vary among competitions, are sometimes unfair.[12] Critics

[10] Hernandez, *supra* note 1, at 84.

[11] *Id.* at 74.

[12] Not all moot court competitions are created equally, and some are run poorly. The better competitions have (1) three or four preliminary rounds, not merely two, to make scoring more fair and to enhance the competition's educational mission by not sending students home too quickly; (2) head-to-head scoring, not cumulative-point scoring, in which teams advance based on the number of wins and then, in the event of a tie, by win-loss point differential; (3) power ranking for the advanced rounds; (4) a high number of teams going to advanced rounds (*e.g.*, not a twenty-team competition cut to a four-team semi-final round); (5) scoring in which no one judge can skew the results by reversing the majority, an event possible if the entire panel of judges does not agree on a score for each team or if each judge scores each advocate separately and the competition host simply adds up the scores; (6) opportunities for each team to see every brief, not just those against which they are competing; (7) at least three judges in a round; (8) bench briefs written after the authors have read the competition briefs, so that the competition host will explain the law to its judges accurately and also encourage its judges to ask competitors the right questions and those that the competitors will really argue; (9) prepared and competent bailiffs (sometimes called clerks or timekeepers), and (10) honesty-promoting rules that require the host immediately after the competition to give every team every judges' oral argument and brief scores of every speaker and team. The better competitions (1) do not allow their hosts to compete; (2) remind their judges repeatedly not to score on the merits or to give higher or lower scores to the team with the legal position they perceive as harder; (3) encourage their judges to ask only short and relevant questions; (4) have two distinct and balanced moot court problems, one for each speaker, both arising from a related set of facts and a plausibly realistic procedural posture; and (5) award lots of nice plaques and hardware to lots of teams and individuals. The better competitions also give their judges good judging guidelines, such as the Legal Writing Institute's Moot Court Committee (Jim

note that moot court judges as a group are inconsistent in their scoring; some score on the merits despite rules prohibiting judging on the merits, while other moot court judges are unprepared, disinterested, unskilled, focused on the irrelevant, or overly aggressive in their questioning.[13] Critics argue that moot court makes individual merit irrelevant because advocates argue in teams and therefore that unprepared or ineffective partners hinder well-prepared and effective ones. Critics also argue that membership on a moot court team is an insignificant boost to a resume compared to membership on law review or a journal.[14]

Other skeptics argue that moot court does not prepare students for "real life" appellate advocacy.[15] In his critique of moot court, Ninth Circuit Chief Judge Alex Kozinski contends that requiring moot court judges to evaluate students on their advocacy skills and not the merits of the case "is a drastic departure from the way things happen in real life."[16] Judge Kozinski also notes that because moot courters must argue both on- and off-brief,[17] they have no emotional investment in their client's hypothetical case—an important motivator in real appellate advocacy.[18] Judge Kozinski chides moot court programs for not preparing students to deal with "the most important aspect of any case: the record."[19] Many moot court fact patterns, he believes, invite policy arguments rather than arguments based on law.

Some of Judge Kozinski's contentions are valid, but moot court is worth the effort. Moot court will not teach many aspects of appellate advocacy, such as pre- and post-argument

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Dimitri & Melissa Greipp, Principal Authors), *Model Oral Argument Judging Guidelines*, *available at* http://memphis.edu/law/newsroom/newspages/kritchevskymodeljudgingguidelines.pdf (last visited Nov. 20, 2012) (offering excellent guidelines for moot court competition judges on preparing for, judging, evaluating, scoring, and critiquing moot court students).

[13] *See, e.g.*, Hernandez, supra note 1, at 84 ("I have witnessed a fair amount of substandard, even atrocious, judging. Some judges are completely unprepared and spend the first several minutes of the argument flipping through the problem and bench brief (usually to the detriment of the first advocate's score)."). Moot court has other critics as well. One critic has even noted that moot court judges' critiques, particularly of advocates' clothing and speaking style, may be gender-biased and thus discourage women from litigating. *See* Mairi N. Morrison, *May It Please Whose Court? How Moot Court Perpetuates Gender Bias in the "Real World" of Practice*, 6 UCLA WOMEN'S L.J. 49, 62-64 (1995). Another disfavors teaching moot court during a first-year legal-writing class "because, as the capstone of the first-year writing program, it certainly reinforced a 'litigation bias'" that contradicts alternative dispute resolution. *See* Kate O'Neill, Symposium: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges, Part I, *Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course*, 50 FLA. L. REV. 709, 714 (1998). On the other hand, getting high-school students involved in competitive moot court is the among the best ways to teach law and engage in community outreach. *See, e.g.*, Maryam Ahranjani, *High School to Law School: Marshall-Brennan and Moot Court*, *available at* ssrn.com/abstract=2126620 (last visited Nov. 20, 2012).

[14] Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178, 180 (1997).

[15] *See, e.g.*, Robert J. Martineau, *Moot Court: Too Much Moot and Not Enough Court*, 67 A.B.A. J. 1294 *passim* (1981), *reprinted in* ROBERT J. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY 207-14 (1985).

[16] Kozinski, *supra* note 14, at 181.

[17] "On-brief" means that a competitor is arguing an issue from the perspective in the competitor's brief. "Off-brief" means that a competitor is arguing the issue from the perspective opposite from the brief the competitor wrote.

[18] Kozinski, *supra* note 14, at 185-86.

[19] *Id.* at 188.

appellate motion practice, the sequential (non-simultaneous) submission of briefs, writing reply briefs, and many other things. But "[m]oot court oral arguments closely simulate appellate arguments in the real world"[20] and teach the skills required for success at lawyering. And moot court might be condemned for stressing form over substance—writing and speaking rather than which side has the more meritorious case. As one judge noted, "Moot court judges grade advocates. Court of appeals judges decide cases. The difference is vast."[21] But as that same judge conceded, "the skill of an advocate sometimes does determine a decision."[22] Every law school in America trains students those winning skills in the moot court tradition. Not every law school can be wrong.

To the extent that moot court is subjective and unjust, our response is "welcome to the real world," a world in which lawyers must strive to improve those things that are good, not to discard them altogether.

Despite the difficulties and problems with moot court, many benefits accrue to student competitors, who are essentially the law school's football team and carry the law school's flag onto the field. Among the perks are travel to competitions paid by the law school, networking and scholarship opportunities, awards and other recognition, and accomplishments to list on a résumé for life. Membership in the National Order of Barristers, an honor society for participants in moot court organizations akin to Phi Beta Kappa for undergraduates and the Order of the Coif for high grade-point achievers in law school, is an additional recognition for students who excel in written and oral advocacy.[23]

Legal education also benefits from moot court. Law schools use competitions to show off their institutions to other schools and to their moot court judges. Law schools also promote themselves by highlighting the success achieved by their moot court teams, and moot court successes increase recruiting and fundraising. Law schools look with pride on their moot courters after graduation; moot courters tend to be among the schools' most loyal alumni. Among other things, moot courters return to their alma maters to coach moot court teams and judge competitions.[24] Although law review is generally regarded as the "best" extra- or co-curricular credential, employers know that successful moot courters are a "double threat" as effective writers and speakers.[25] Moot courters gain experience preparing the types of

[20] Hernandez, *supra* note 1, at 73.

[21] Alvin B. Rubin, Book Review, *What Appeals to the Court*, 67 TEX. L. REV. 225, 225 (1988) (reviewing MICHAEL E. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE (1987)).

[22] *Id.*

[23] *See* National Order of Barristers, http://www.utexas.edu/law/advocacy/boa/barristers.html (last visited Nov. 20, 2012).

[24] Not to disparage student journals and law reviews, but how often have we heard of their alumni returning for an evening or two each year to help junior editors Bluebook citations?

[25] Dickerson, *supra* note 2, at 1226.

documents produced by litigation firms and thus are attractive new hires because their learning curve is less steep than non-moot courters'.[26]

Moot court also develops students' ability to work collaboratively with their teammates and other lawyers. The moot court process requires students to work as a team in formulating legal arguments, an important talent for practicing attorneys. Competitors working in teams should work together to write a cohesive brief, even when teammates write different sections of the brief. Teammates should work together to review, edit, and revise the brief until it is the best piece of writing the team can collectively draft. By teaching that a team is only as good as its weakest link, moot court forces teammates to teach one another, and all participants learn as a result. Then, moot court participants, together, will work tirelessly to develop their arguments and practice, practice, practice.

Despite its inability to replicate real appellate advocacy directly, moot court is the clearest window (other, perhaps, than a course in pure appellate advocacy or clinical appellate-advocacy course) into appellate practice that law students can get. Furthermore, moot court is a chance to argue seminal issues of law before leading academics, practitioners, and judges. The best moot court competitions feature prominent state and federal judges who evaluate advocates' skills and suggest ways to improve those skills. Aside from the substantive experience students gain from practicing oral argument, students receive valuable feedback from those who have the most experience in crafting and delivering oral argument. And near the end of many competitions is a banquet at which students can network with the attorneys and judges involved in the competition. These networking opportunities can set the foundation of a successful career: getting a good first job.

To get the best possible experience from moot court and win a moot court competition in the process, student-advocates must understand the benefits and challenges of the moot court experience.

Winning the competition starts with being familiar with the competition itself. The moot court process begins with the legal brief. The brief is the first opportunity that moot court competitors have to show their ability to comprehend the issues presented in a competition. The brief tests the competitors' ability to analyze the legal field's uncertainties and provide thoughtful answers to them. The brief allows competitors to show the competition's brief-scoring judges that they can and do think like lawyers.

As competitors research and write, they should ask themselves questions like "What elements of the case have been addressed by case law and statutes?"and "What legal theory can be crafted to address both the facts of the case and the relevant authorities?" Competitors should spend considerable time researching and drafting the brief, including multiple iterations

[26] *Id.*

and revisions,[27] to ensure that their writing reflects their understanding of the issues presented and that their assertions are comprehensive and coherent. Writing a good brief saves time researching the legal issues during the oral-argument practice phase, and a brief must score well for the advocate's team to win. It is a rare competition in which a team with a losing brief ranks first in the competition overall. That is as it should be. One cannot be a moot courter's moot courter without being a good writer and a good speaker, just like one cannot be a lawyer's lawyer without being a good writer and a good speaker.

The second component of the moot court experience, oral argument, is an opportunity for competitors to elaborate on their written submissions and further explain how they worked through the uncertainties of the case to arrive at their conclusions. In this regard, competitors must be prepared to assist the moot court judges, who are themselves working through the uncertainties, by offering succinct and direct responses to the judges' questions. To accomplish this task, competitors need to be much more than clever, superficial orators highlighting the key points of their brief and stressing form over substance. They must be responsive, forthcoming, clear, fluid, professional, convincing, and likeable. And while respecting the judges personally and their dominance over all things procedural and the courtroom, they must assert control and be dominant on and confident about all matters concerning the facts and legal arguments of their cases.

In a typical moot court oral argument, three to seven judges will have ten to twenty minutes, depending on the competition and whether the advocate reserves rebuttal time, to get answers to their questions. Advocates do not manage the parameters of the argument—at its best, really a conversation and dialogue between advocate and judge—as directly as they do in their briefs. Instead, in oral argument, the panel of judges directs the argument. Judges might ask prepared and organized questions or ones that are spontaneous and only tangentially relevant to the case.[28] The questions could be friendly, meaning that the judges support the advocate's position and ask questions that are not especially challenging. Conversely, the questions could be confrontational and hostile to the advocate's position. The questions might be ones that real judges would ask, or they might be ones designed to test the student

[27] It is often helpful to take a day or two away from the brief after a revision before returning to it. This helps writers catch mistakes and include additional perspective to the argument.

[28] *See* Timothy S. Bishop, *Oral Argument in the Roberts Court*, 35 LITIG. 6, 8 (2009) (noting that a court may ask anything it believes could be helpful in deciding the case). At oral argument in Holly Farms Corp. v. Nat'l Labor Relations Bd., 517 U.S. 392 (1996), for example, a case about a contractual dispute, Justice Scalia asked the petitioner, "Why do they debeak chickens?" Transcript of Oral Argument at 56, *Holly Farms* (1996) (No. 95-210) (cited in Bishop, 35 LITIG. at 6).

advocates' "moot court skills."[29] Excellent advocates must therefore meticulously prepare and rehearse answers to countless questions the moot court will and will not pose.[30]

As with any appellate presentation, excellent advocates must be both well-prepared and persuasive.[31] Persuasiveness is affected by several factors, including appearance, body language, argument structure, delivery, and responsiveness. To argue persuasively, advocates should argue their positions under the assumption that the moot court will decide the hypothetical case.[32] This assumption should be tempered by the fact that moot court judges cannot and generally do not prepare for oral argument in the same way that real appellate judges do.[33] Although moot court judges receive materials that guide them through the parties' respective arguments,[34] the judges will not be as educated about the case and the issues as real appellate judges, who, before oral argument, review the parties' briefs, the record below, and their law clerk's bench memorandums.[35] As a result of their preparation, real appellate judges ask sophisticated and focused questions. In contrast, the scope of moot court judges' preparation is limited. Moot courts are composed of judges with various levels of knowledge of the moot court problem and understanding of its legal issues.

An advocate's ability to convey points clearly and persuasively to the judges is crucial to a winning oral argument. Persuasive oral argument requires advocates to be attentive to judges' concerns about their legal reasoning. Excellent advocates satisfy doubts that arise in the judges' minds. They demonstrate, "by the substance and manner of [their] presentation,"[36] that they are knowledgeable, credible, and candid. Advocates demonstrate this by persuasively

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[29] *See* Barbara Kritchevsky, *Judging: The Missing Piece of the Moot Court Puzzle*, 37 U. MEM. L. REV. 45, 53 (2006). As this article explains, some skill sets are unique to moot court. Seasoned moot court judges ask questions that test the participants' knowledge of moot court protocol.

[30] Bishop, *supra* note 28, at 8 ("In 30 minutes, the Court may pose 60 to 80 questions, but be ready to answer hundreds more.").

[31] *See* Gerald Lebovits, *Effective Oral Argument: 15 Points in 15 Minutes*, [2008] THE ADVOCATE, Spring/Summer, 4, 4 ("The advocate's goal . . . is to win. To win is to persuade.") [hereinafter Lebovits I], *available at* http://works.bepress.com/gerald_lebovits/122/ (last visited Nov. 20, 2012); James D. Dimitri, *Stepping Up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 STETSON L. REV. 75, 78 (2008) ("The first purpose of oral argument [is] persuasion.").

[32] *See generally* Kritchevsky, *supra* note 29, at 57 (encouraging moot court judges to assume that they will actually have to decide the case) (citing Louis J. Sirico, Jr., *Teaching Oral Argument*, 7 PERSP. TEACHING LEGAL RES. & WRITING 17, 18 (1998) ("We should encourage the moot court judge to role-play the real judge.")).

[33] Kritchevsky, *supra* note 29, at 55 (noting that moot court judges cannot prepare the same way real judges do).

[34] *Id.* at 56 (listing the materials given to moot court judges, such as the problem/record, a bench brief, outlines of the expected arguments, and copies of key statutes and cases).

[35] *See* Mark R. Kravitz, *Oral Argument Before the Second Circuit*, 71 CONN B.J. 204, 204 (June 1997) (stating that before oral argument, the judges will have read the briefs, thought through the issues, and discussed the case with their law clerks); Albert J. Engel, *Oral Advocacy at the Appellate Level*, 12 U. TOL. L. REV. 463, 465 (1981) (emphasizing that judges read every brief and reply brief); *but see* Kritchevsky, *supra* note 29, at 55-56 (noting that moot court judges rarely see the briefs before the oral arguments and receive only a packet containing the record and a bench memo to guide the judges through the oral argument).

[36] *See* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 141 (2008).

framing the legal issues in a strategic yet logical way,[37] thinking on their feet, adapting in the moment, and projecting confidence. Excellent advocates answer questions clearly and directly, tell the court exactly what it should do, and make the judges like them.[38]

To win a moot court oral argument while learning the most from the experience, advocates must prepare meticulously, sharpen their public speaking skills tirelessly, and alleviate the moot court's concerns by satisfactorily answering questions. Winning moot court advocates compete enthusiastically, follow appellate-advocacy traditions, and comply with moot court protocol. Perhaps most important, winning moot court advocates appreciate that moot court judges score advocates well when the judges not only like the advocates but also believe that the advocates like them. Judges in every court, real and moot, want to be liked. Advocates are persuasive when they are confident of their case and of themselves, yet cordial and deferential to the judges.

2. PREPARATION

A. Knowing the Rules

Preparation for oral argument in a moot court competition starts with studying the competition's rules and format for oral argument. Just like practicing attorneys, who must operate within courts' rules, moot court advocates must operate within their competition's rules or risk penalty or disqualification.[39] The advocate must read and comprehend the rules in their entirety the moment they are released. Advocates should discuss the rules with teammates, coaches, and faculty advisors to ensure that the entire team understands the parameters.[40] Among other things, the rules typically provide for an allocation of time for argument, how that allocation may be distributed between or among the advocates, and how much time may be reserved for rebuttal or, in a very few and select competitions, sur-rebuttal. The rules regulate the number of teams that may represent a school, the number of students who may serve on each team, and whether schools with more than one team will argue against one another. The rules also disclose how competitors will be scored individually and as a team, the scoring allocation between briefs and oral scores,[41] and the procedure for advancing to higher rounds.

The need to learn and follow the rules cannot be understated. Moot court competitions are like any other competition, with points and penalties. The goal, perhaps obviously, is to accumulate the most points and win. Making foolish mistakes by disregarding or overlooking

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[37] *See id.* at 41 ("The most rigorous form of logic, and hence the most persuasive, is the syllogism. . . . [T]he clearer the syllogistic progression, the better."). Syllogism is reasoning from the general to the specific.

[38] Kritchevsky, *supra* note 29, at 65.

[39] MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, ADVERSARIAL LEGAL WRITING AND ORAL ARGUMENT 282 (2006) [hereinafter MURRAY & DESANCTIS II].

[40] *Id.*

[41] For example, the rules might state that a team's overall score is equal to the sum of X% of oral argument scores and X% of brief scores. In most competitions, the brief scores are worth less in the higher rounds and count for nothing in the final round.

the rules will result in penalties, some severe. In nearly every competition, a team that otherwise might advance past the preliminary rounds will not advance because it will fail to follow the rules, either in writing the brief or in conducting oral argument.

The first step in maximizing a team's chances of winning is to comply with the rules. Once advocates are familiar with their competitions' procedural rules, they can prepare their substantive arguments, beginning with the brief. The second and more strategic step is to take advantage of the rules. For example, better advocates should speak a bit longer than less skilled ones, if the rules allow speakers to split their time unevenly. That way the team as a whole will score well. And if the rules include oral scoring sheets that tell the judges to reward particular skills or aspects of a presentation (such as a conclusion), advocates should emphasize those skills and aspects of presentation to get high scores, even when doing so will contradict otherwise accepted moot court advice.

B. Building the Argument: Theme and Roadmap

The process of creating arguments begins with the briefs.[42] Advocates should use their briefs to structure their arguments. During the brief-writing phase and in advance of submitting their briefs, advocates should conduct a few oral-argument practice rounds. Practice rounds during brief-writing enable competitors to see and address the strengths and holes in their arguments; advocates can then address these issues in the brief. A strong brief makes preparation for oral argument significantly easier. A winning brief might even allow a team to win a round it lost in oral scores—a reversal, in moot court parlance—and advance despite poor oral scores.

In many competitions, especially the larger and better ones, the briefs that teams submit are posted on a competition website or mailed to the competitors. Advocates should study these briefs to supplement their arguments and spot weaknesses in their own briefs. When preparing to argue off-brief, competitor briefs are especially helpful in formulating substantive arguments. Advocates should read every team's brief, identify the best briefs, and incorporate into their own arguments the best teams' strongest arguments and citations.

In terms of preparing the substantive argument, moot court advocates should view oral argument as an opportunity to discuss with the moot court judges the resolution of difficult legal issues.[43] The goal of the presentation is to persuade the moot court judges to resolve the issues in the advocate's favor[44]—and to score better than the other team. To help persuade the judges to rule in their favor, advocates should prepare and develop a theme for their side of the

[42] *Compare* Coleen M. Barger, *How to Make the Losing Oral Argument*, 41 Ark. Law. 16, 16 (2006) (observing that preparation limited to "a quick skim of your own briefs" is the first step to failure in a moot court argument).

[43] *See* Kritchevsky, *supra* note 29, at 72.

[44] Dimitri, *supra* note 31, at 78 ("This role [as an advocate] requires you to attempt to convince the court that your client should win the appeal.").

case. A good theme will persuade a moot court that an advocate's position is correct.[45] The theme should be as simple as possible (preferably one sentence long) and summarize an advocate's position without being outrageous or inflammatory.[46] It should be based on favorable law and fact and appeal to common-sense notions of fairness and justice.[47] It should condense the issue before the court into a "right-wrong question" that begs a decision.[48] This question should reflect the key facts of the case but ought not include detail about the relevant law or statutory interpretations; this information is meaningless unless the advocate first provides context and a framework. The theme, which a smart high-school student should understand, should suggest that "justice would suffer" if the judge does not rule for the advocate on at least some issues[49] and that the court can fix an injustice committed against the client.

The type of theme chosen depends on the relief the advocate is seeking and which side the advocate is arguing. If the petitioner/appellant seeks substantive relief, the theme could be rooted in the notion of "equity," arguing that the trial court's ruling has harmed the client. By contrast, a respondent/appellee whose case rests on precedent might choose "legal stability" as the theme.[50] Advocates should imagine themselves in the position of their client, the trial lawyer, the trial court, and the appellate court when formulating a theme.[51]

Adopting the client's perspective allows advocates to access the emotional dimension of the case and perhaps construct a theme of "fair substance," which articulates to the court how the law has wronged the client. If the trial attorney encountered problems admitting or excluding evidence, the petitioner/appellant could focus on the theme of "fair process."[52] Advocates who represent the respondents/appellees should consider the trial court's position and the discretionary rulings it made. Discretionary rulings result from the leeway that must be accorded to a trial court so that it can function effectively.[53] The harmless-error doctrine prevents frivolous appeals by requiring the appealing litigants to prove that that their substantial rights at the trial level were harmed before an appellate court may reverse or

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[45] *Id.* at 80-81 (stating that identifying a theme and conveying it to the court fulfills an advocate's obligation to persuade the court that the client's position is the correct one); Stephanie A. Vaughan, *Persuasion is an Art . . . But it is Also an Invaluable Tool in Advocacy*, 61 BAYLOR L. REV. 635, 648-49 (2009) ("A theme has a great effect in persuading the tribunal to side with the advocate . . . . [and in] giv[ing] the tribunal a reason to apply the law in the advocate's favor.").

[46] Vaughan, *supra* note 45, at 649 ("A theme should not be outrageous or inflammatory but should be anchored in common sense [and] reason. . . .").

[47] *See* BRADLEY G. CLARY, SHARON REICH PAULSEN & MICHAEL J. VANSELOW, ADVOCACY ON APPEAL 60-61 (3d ed. 2008) (discussing the importance of a legally sound theme).

[48] JOHN T. GAUBATZ & TAYLOR MATTIS, THE MOOT COURT BOOK: A STUDENT GUIDE TO APPELLATE ADVOCACY § 4.2(b), at 86 (3d ed. 1994).

[49] *Id.* § 2.5(b), at 35.

[50] *Id.*

[51] *Id.* § 2.5(b), at 36.

[52] *Id.*

[53] *Id.*

modify the judgment below.[54] The theme here might be "protect[ing] the viability of the judicial process."[55] Appellate courts always consider how their decisions affect public policy and future cases. A winning theme addresses the positive policy implications of a ruling in the advocate's favor.

In addition to being a persuasive tool, themes help advocates remember key points and respond to questions, particularly when advocates are unsure of the answer.[56] Advocates who return to the theme of the argument will give themselves direction and moot court judges a sense of the big picture.

Because theme is crucial for a successful oral argument, it is important to develop the theme while writing the brief. The theme will affect what arguments are included and excluded and how much weight and emphasis to give those that are included.[57] The theme should flow throughout the brief, such that the reader will never forget the point of the argument. Although appellate courts frown on oral arguments not grounded in the brief, judges in most moot court competitions are not given the briefs (or, if they are, few judges will read them before the oral argument). Instead, the judges typically rely on a bench memorandum prepared by the moot court board or bar association hosting the competition. Once an advocate identifies a theme and its supportive facts and legal arguments, the advocate should outline the argument in a way that fits within the theme.

Advocates should focus the moot court on the two or three reasons why they should win and relate those reasons to their theme.[58] Advocates should identify which issues are necessary to vindicate their argument, which were included in their briefs merely as canned reasons the judges could use to rule in their favor, and which are simple red herrings—or even mistakes in the fact pattern. For purposes of oral argument, advocates should choose two or three of the former and discard the latter.[59] More than two or three reasons will dilute the argument, diffuse the panel's attention, cause the advocate to run out of time, and lead to arguing non-meritorious claims. These two or three reasons will constitute the roadmap, or outline, of the argument and must be stated early in the oral presentation—in the first forty-five to sixty seconds of the presentation. Giving judges a roadmap helps advocates structure the argument and immediately introduces judges to the issues the advocate will address. The roadmap also allows the advocate to outline the major, relevant reasons to support the argument. Each prong of the roadmap should function as a heading that crystallizes the

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[54] Fed. R. Civ. P. 61.

[55] GAUBATZ & MATTIS, *supra* note 48, § 2.5(b), at 36.

[56] *See* Lebovits I, *supra* note 31, at 5 ("If you have a theme of your case, you will never get stuck answering a question.").

[57] GAUBATZ & MATTIS, *supra* note 48, § 4.2(b), at 88.

[58] Dimitri, *supra* note 31, at 81 (noting that advocates have a short amount of time to present their case and should concentrate on two or three points).

[59] GAUBATZ & MATTIS, *supra* note 48, § 4.2(c), at 88.

reasoning into a single persuasive sentence. The reasons outlined in the roadmap should be organized by importance, but threshold procedural or substantive issues, such as standing or statute of limitations, should go before the merits.

C. Accounting for Standards of Review

As in real appellate advocacy, advocates must know the standards of review applicable to their arguments. Skillful organization of the substantive issues and an impressive oral delivery are not enough to win relief for a client. Many real-life appellate courts require advocates to note in the written brief what standard applies to the issues at hand.[60] The standard of review can have a significant impact on what arguments are included in the brief.[61] For most appellate judges, the standard of review is a key concern as the court prepares to hear a case.[62] Advocates must know the extent of deference, if any, that an appellate court will give to the initial decision-maker.[63]

The appellate court decides questions of law de novo—as if the issue were being decided for the first time on appeal. On issues of fact, however, the trial court is accorded significant deference. Only on rare occasions is the appellate court bothered enough by the trial court's factual findings to reverse the decision on that basis; the trial court's findings, under the federal standard of review, must be clearly erroneous for the appellate court to reject them.[64] A clearly erroneous factual finding should stand out in the record or fact pattern; if advocates believe that they have identified an error of fact, they should check the law of their jurisdiction to see whether the courts have previously identified the error as an error warranting reversal.[65] The difficulty for even the experienced advocate is that many issues are not either purely questions of law or purely questions of fact but are a mixture of both.[66] Furthermore, the language some courts use to set the standard of review is ambiguous and inconsistent. Most moot court competitions focus on issues of law to be decided de novo; rarely will a moot courter have to challenge a trial court's findings of fact.

The question of the applicable standard should not be skirted. In some cases, it is an advocate's most compelling argument. Even when it is not compelling, advocates must know the standard because many moot court judges ask about them to test the advocates' knowledge of legal method or because they do not know what else to ask.

In those competitions that address administrative law, advocates must be aware of standards of review for particular issues of administrative law and regulation. They should know the standard of review that courts use to evaluate the decisions of administrative

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[60] URSULA BENTELE, EVE CARY & MARY R. FALK, APPELLATE ADVOCACY: PRINCIPLES AND PRACTICE 109 (5th ed. 2012)
[61] *Id.*
[62] ALAN L. DWORSKY, THE LITTLE BOOK ON ORAL ARGUMENT 48 (1991).
[63] BENTELE ET AL., *supra* note 60, at 109.
[64] *Id.* at 110.
[65] MURRAY & DESANCTIS II, *supra* note 39, at 291.
[66] BENTELE ET AL., *supra* note 60, at 110.

tribunals, whose decisions are accorded substantial deference. In considering the constitutionality of administrative regulations under federal law, courts apply the *Chevron* standard.[67] Both the substantial-deference standard and the *Chevron* standard recognize the significant role administrative tribunals and agencies play in shaping the law. Administrative agencies spend considerable time implementing and enforcing their own statutes and thus have more experience than appellate courts in interpreting the statutes.[68] Federal judges, who "have no constituency" to whom they must answer,[69] should not resolve the public-policy concerns inherent in administrative statutes.

Motion standards of review and doctrines concerning error preservation also influence the outcome of appeals. Motion standards of review vary with the type of motion, but one of the most common in moot court fact patterns is an appeal from a motion court's decision on a motion to dismiss for failure to state a cause of action.[70] When judges consider a motion to dismiss, they assume all facts in the complaint to be true.[71] Similarly, when considering a summary-judgment motion—another typical platform for moot court competitions—the "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."[72] Summary judgment must be denied, however, if a dispute arises over a "*genuine* issue of *material* fact."[73] Advocates must also understand the harmless-error doctrine, which prevents appellate courts from becoming clogged with appeals in which the trial court erred but in which the results would not have changed had the trial court ruled correctly. At the federal level, "the court must disregard all errors and defects [at trial] that do not affect any party's substantial rights."[74]

Advocates should also consider the preservation doctrine. With some notable exceptions of which advocates must be aware, legal issues raised on appeal must first have been presented to the trial court.[75] In this way, the trial court can consider the objection, the opposing party can respond, and the error can be corrected without wasting judicial resources

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[67] An appellate court that reviews an agency's construction of a statute first investigates whether Congress has weighed in on the issue at hand. If Congress has not spoken on an agency's interpretation of a statute it administers, an appellate court cannot impose its own interpretation of the statute. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Instead, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

[68] Bradley Lipton, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L.J. 2096, 2121 (2010).

[69] *See* Chevron, 467 U.S. at 866; *accord* Lipton, *supra* note 68, at 2122.

[70] *See* Fed. R. Civ. P. 12(b)(6).

[71] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007).

[72] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

[73] *Id.* at 248.

[74] Fed. R. Civ. P. 61; *accord* Fed. R. Crim. P. 52(a). The degree to which a trial error affected a party's substantial rights depends on a variety of factors. For instance, an error that affected a defendant's constitutional rights might be more harmful than an error that impacted rights guaranteed by statute or common law. *See* BENTELE ET AL., *supra* note 60, at 224.

[75] BENTELE ET AL., *supra* note 60, at 60.

on an appeal.[76] If the moot court fact pattern contains enough material for advocates to determine whether the issues were preserved, advocates should cite the fact pattern to prove that the issues they are arguing were indeed raised before the trial court.[77] Some moot court fact patterns, however, will explicitly note that "[t]his issue was properly raised at trial and preserved for appeal."[78] When the fact pattern does not provide enough facts for advocates to determine whether an issue was preserved, they should assume that, for the purposes of moot court, the issue was properly preserved.[79]

D. Studying the Record

Advocates should have a good familiarity with the record from writing the brief. But at oral argument they must know the record and procedural history of the case intimately. Even though the moot court might (or might not) know the record well, advocates should have the best knowledge of the case and be able to cite particular facts of the fact pattern on demand.[80] If judges question advocates on a fact, advocates should be prepared to cite the page on which the fact appears. This includes memorizing the facts that support the strengths and weaknesses of an advocate's case, the opportunities to advance their interests, and the threats to their case.[81] Intimate knowledge of the record combined with substantial legal authority to support the argument and a cohesive theme enable advocates to answer almost any question during oral argument. It also allows advocates to showcase their knowledge of the facts and law to will impress the judges and lead to high scores. One of the most important goals is to make the judges aware of facts that the judges might have forgotten or missed when initially reading the brief or, in the case of a moot court, the fact pattern and bench memorandum.[82] Advocates who can correctly and confidently refer the judges to the location of specific facts in the record show that they are well-prepared and knowledgeable.

Advocates also need to be aware of the legal authorities on which their own and their adversaries' cases rest. They must be able to explain in detail the cases that support their position and distinguish cases harmful to their argument. It is critical that an advocate review an adversary's brief and identify cases that might be used against the advocate. Relying exclusively on their own written briefs as preparation for oral argument will not make

[76] *Id.* at 61.

[77] MURRAY & DESANCTIS II, *supra* note 39, at 291.

[78] *Id.*

[79] *Id.*

[80] Vaughan, *supra* note 45, at 668-69 ("Even if the tribunal knows the law well, it is the advocate who has the most in-depth knowledge of the case.").

[81] *Id.* at 643 (recommending that advocates use the "SWOT analysis" when reviewing the record: identifying the strengths of a party's case, the weaknesses of a party's case, the opportunities to advance a party's interests, and the threats to a party's case).

[82] BENTELE ET AL., *supra* note 60, at 356.

advocates sufficiently familiar with the case. Nor will it allow advocates to synthesize the facts with the relevant case law, including that used by an adversary.[83]

E. Preparing Notes for the Argument

Advocates should expound in outline format each issue in the roadmap. Arguments supporting each issue should cite legal authority and facts from the record. Although the outline's level of detail is up to the advocate, the outline should be short, concise, and uncomplicated.[84] In addition to stating the issues and supporting arguments, it should also objectively list favorable and unfavorable facts. Within the outline should be mini-outlines of the principal cases relied on by the advocates, their opponents in their briefs, and the lower court(s) in the record by listing the cases' holdings, reasoning, and key facts. In outlining their argument, advocates should avoid exhaustive discussion of precedents. Advocates may explain what the holdings are, but they should not elaborate on them unless the bench has questions.[85] Advocates should be prepared not just to recite the facts to the court but to organize them in a way that supports their case. Advocates should articulate the point they believe the facts illustrate and not assume that the judges will infer the same meaning the advocate does.[86] Advocates should avoid the temptation to lecture on academic issues of law.[87] Nor should advocates dwell on well-established principles or detail the history of a legal proposition unless doing so is necessary to make a concise, comprehensible argument or to show a split in the courts on a legal question. As they prepare their arguments, advocates should not lose sight of their theme, the crucial facts of the case, and the relief sought.

In drafting the outline, advocates should evaluate the importance and merits of the arguments supporting their key issues. Advocates need to identify which supporting arguments are required to win an issue. Advocates should also identify each issue's weakest arguments—about which the court is likely to have questions—and develop responses in advance. As they did when constructing a theme, advocates need to think about public-policy considerations that could affect the court's acceptance or rejection of a particular argument. Advocates should be aware of how the argument relates to current trends in the law and how the argument would affect the real-world legal landscape.[88] Advocates should take their adversaries' arguments seriously, recognizing that the court will likely question them in reference to those points.[89] The

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[83] BOARD OF STUDENT ADVISERS OF HARVARD LAW SCHOOL, INTRODUCTION TO ADVOCACY: RESEARCH, WRITING, AND ARGUMENT 70 (7th ed. 2002).

[84] *See* Dimitri, *supra* note 31, at 85 (suggesting a short and concise outline with bullet points, buzz phrases, or key words to describe points); *but see* Vaughan, *supra* note 45, at 669 (suggesting that advocates not be concerned with an argument's length at this stage).

[85] SCALIA & GARNER, *supra* note 36, at 171.

[86] UCLA MOOT COURT HONORS PROGRAM, HANDBOOK OF APPELLATE ADVOCACY 30 (Lawrence Brennan et al. eds., 3d ed. 1993).

[87] GAUBATZ & MATTIS, *supra* note 48, § 4.2(e)(ii), at 91.

[88] BOARD OF STUDENT ADVISERS OF HARVARD LAW SCHOOL, *supra* note 83, at 72.

[89] *Id.*

shrewd advocate will be prepared not only to defend the weak points of an argument but also to concede an argument or adverse case when necessary. At times, conceding is a better use of time than defending a dead argument not crucial to victory,[90] and conceding can often help strengthen the advocate's credibility with the judges. Conceding may be appropriate, for example, on a threshold issue such as standing or jurisdiction. But advocates should never concede an argument required to win,[91] even when the judges seem to want that concession and even when the advocate has exhausted all alternative points. If that happens, the advocate should transition quickly to a new point, without ever conceding.

Although there is no single way to prepare for oral argument, advocates should be aware of some ways to sabotage their own arguments. Some suggest that advocates write out the entire argument in its totality during the preparation stage. But oral argument is supposed to be a conversation between the advocate and judges. Appellate and moot courts frown on the reading of a prepared text during oral argument. Doing so is one of the most serious mistakes an advocate can make. Attorneys and moot court alumni who advise writing the full argument (again, while knowing that it cannot be read to the bench) believe that doing so reveals to the advocates what they do and do not know. It is also a way to identify awkward transitions between issues and to help advocates structure their arguments effectively.[92] But most moot court veterans—and the authors of this article—fear that a written argument will be memorized by an advocate, who (even if the advocate avoids the mistake of reciting it to the bench) will be unable to respond to unexpected questions smoothly, comprehensively, and conversationally.[93] For these reasons, a detailed outline of arguments rather than a prepared narrative is an advocate's best friend during the preparation phase. Many advocates find it useful to memorize only their introduction and roadmap. Doing so reduces nervousness by opening on a confident note and allows the advocate to make eye contact with the judges from the argument's onset.

Because each bench is different, advocates should prepare two different outlines. Advocates must be prepared to speak to a cold bench, which asks very few questions, and to a hot bench, which constantly interrupts with questions and comments.[94] Both versions should be identical through the roadmap, but once the roadmap ends, the versions should differ in detail, transitions, and case discussions. When dealing with a hot bench, it is likely that the bench's questions will force advocates to address points out of order and at the level of detail the questions elicit. Judges on a hot bench are likely well-versed with the record and the law and will ask probing questions related to the policy implications of what the advocate is

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[90] *Id.*

[91] MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 258 (3d ed. 2010).

[92] CAROLE C. BERRY, EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT § 9.35, at 166 (4th. ed. 2009) (noting that "[s]ome advocates feel it is best to write the argument in its totality").

[93] *Id.*

[94] *See* SCALIA & GARNER, *supra* note 36, at 154.

urging.[95] When dealing with a cold bench, it will be up to the advocate to determine how much time to spend on each point and how to make natural transitions between points. Sometimes a bench is cold because it is unfamiliar with the bench memo or brief. In this case, the advocate must develop the facts thoroughly so the court has a foundation on which to consider the issues.

At oral argument, advocates may approach the lectern or podium with notes, although they should use them sparingly, and if they are skilled enough, not at all. As one moot court coach explains, "[i]n competition, judges often seem to give credit to teams [that] do not use notes, so our teams usually work without notes."[96] If they use notes, the notes should not include so much detail as to tempt the advocate to read from them or even rely on them. Outlines should not be in complete sentences; bullet points and headings work well. They can also be words or phrases that remind the advocate of the nature of the case, key facts, and roadmap of the issues with important supporting cases.[97] By the time of delivery, most information, including the cases' holdings and the courts' reasoning, will be second nature to the advocates. But it is useful to have phrases, particularly if the cases use well-known, recognizable phrases, to jog the memory if nervousness overcomes the advocate. Notes should be large enough to read without straining the eyes. They should be typed onto paper taped into the two inside pages on a file folder cut smaller so that it can fit on any small podium or lectern. A file folder that spills out from a podium or lectern creates a bad impression.

Advocates should anticipate questions that the moot court judges might ask, such as policy questions that both sides of the problem raise and hypotheticals that test the consequences of the desired holding, and include point-form responses to them in the outline.[98] Answering questions from the bench without diverging from the major points an advocate intends to make is one of moot court's most demanding challenges.[99] The advocate should view questions as an opportunity to engage the panel and alleviate any concern a judge has about the advocate's argument. Early in the preparation phase, advocates should have begun imagining every possible judicial question. While reading the briefs, advocates should be attuned to factual inconsistencies, loose interpretations of the law, and adverse rulings in

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[95] BOARD OF STUDENT ADVISERS OF HARVARD LAW SCHOOL, *supra* note 83, at 83.

[96] Ronald J. Rychlak, *Effective Appellate Advocacy: Tips from the Teams*, 66 MISS. L.J. 527, 537 (1997). Advocates who speak without notes should brag about it. They should approach the lectern or podium in a way that even obtuse judges will see their lack of notes. They should make the judges see that they are holding nothing (such as notes) by slowly pushing in their chairs with both hands, buttoning their jackets with both hands, beginning their opening making strong eye-contact (which shows that the speaker is not reading), and showing the judges their hands by gesturing with palms upward.

[97] EDWARD D. RE & JOSEPH R. RE, BRIEF WRITING AND ORAL ARGUMENT 152 (2005).

[98] *See* Henry D. Gabriel, *Preparation and Delivery of Oral Argument in Appellate Courts*, 22 AM. J. TRIAL. ADVOC. 571, 578 (1999) (explaining that advocates should anticipate questions like "[s]tate the rule of law as you would have us make it"); *see generally* Kritchevsky, *supra* note 29, at 57 (encouraging moot court judges to prepare policy questions and hypotheticals to test the arguments).

[99] BOARD OF STUDENT ADVISERS OF HARVARD LAW SCHOOL, *supra* note 83, at 81.

similar cases.[100] For national moot court competitions, at which the judges may be prominent state and federal judges known to the competitors in advance, advocates should, if feasible, research the judges' rulings on similar issues. Practicing appellate advocates almost always research the opinions of the judges before whom they will appear.[101] Moot courters should, too.

Without attempting to memorize canned responses to questions, and in a way that will not lead to a robotic delivery, advocates should consider how to make their responses fit into the thrust of the overall argument. Once the theme has been identified and the argument has been outlined, advocates are ready to begin developing and practicing the full argument. By creating an outline in this manner and then studying it, advocates are ready to practice their oral arguments.

III. PRACTICE

The most valuable part of preparing for oral argument, real and moot, is completing practice rounds, [102] a process called mooting, although some call the entire process, including the real round, mooting. Practice connects the initial stages of preparation—developing a theme and creating an outline—with delivering a cohesive, smooth, and fluid argument. Ideally, the mooting process should begin before the brief is submitted. Doing so will (1) improve the quality of the written arguments by helping advocates identify where they must clarify the presentation of their issues and sharpen their arguments and (2) jump-start advocates' oral-advocacy skills.

Whether before or after the brief is submitted, advocates should moot as early and as often as possible with as many different judges as possible. Constant mooting allows advocates to master the substance of their arguments and become comfortable delivering their points. Arguing in front of different people with various levels of knowledge and experiences enables advocates to anticipate the questions that the judges might ask during the competition,[103] to discover issues that have not occurred to them, and to see the flaws in their responses to issues of which they are aware.[104] Ideally, practice-rounds should include not only teammates, student and alumni coaches, faculty advisors, and members of the moot court organization at the advocate's law school, but also judges, professors, practitioners, and anyone else who might have some insight on the substantive law or proper style for delivering a moot court oral argument. Attorneys are often better moot court judges during practice rounds than real judges because they are less willing to listen and more likely to press advocates with hard

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[100] UCLA MOOT COURT HONORS PROGRAM, *supra* note 86, at 19.

[101] BENTELE ET AL., *supra* note 60, at 358.

[102] SCALIA & GARNER, *supra* note 36, at 158 ("No preparation for oral argument is as valuable as a moot court . . . .").

[103] *See* Vitiello, supra note 9, at 890 (noting that "through preparation counsel should be able to anticipate most questions and have thoughtful answers" during the competition).

[104] *See* SCALIA & GARNER, *supra* note 36, at 158.

questions.[105] Advocates should argue before as many different judges as possible so that they may hear every possible question. If possible, advocates should arrange for a high school student, friend, or family member—anyone unfamiliar with the law—to hear a practice round. If they understand the arguments, so will the judges in a moot court round.

When a moot court team practices, the coach and faculty advisor—the better intermural teams have both, and, if lucky, a shadow team and an alumni advisor as well—should write down the questions to ensure that the advocates further research them after the practice round. Coaches should encourage moot courters to look at videotaped final rounds from past competitions. Depending on the competition, the videos might be available online or available for purchase. Coaches should also encourage advocates to videotape their practice rounds and use the footage to spot weaknesses in their delivery and distracting posture and body-language.[106] For substantive issues, advocates should have their coaches and faculty advisors contact expert law professors and practitioners in the field through alumni networks.[107] Advocates should try to find practice-round judges who are unsympathetic to their positions and who will encourage them to develop challenging hypotheticals and questions.[108] Many practicing litigators are hostile, combative, and aggressive—and that is exactly what the advocate needs at this phase. An advocate who can survive a tough practice round will survive a moot court competition round. The coach should give the practice-round judges the best competition briefs other than the team's own brief to use as aids during questioning. The judge can use a petitioner/appellant brief to question respondent/appellee and vice versa. Advocates should also argue their adversaries' positions during practice to identify weak arguments that could be exploited.[109] This is done as a matter of course in moot court competitions, in which advocates must argue off-brief.

Practice rounds should be as real as possible. Advocates should follow court decorum, stay in character, wait until the round ends to ask the judges questions about their performance and how to answer questions, and speak to the mock judges as if they are real moot court judges. Practicing in the room where the oral arguments will take place could be a

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[105] MURRAY & DESANCTIS II, *supra* note 39, at 263-64; John G. Roberts, Jr., *Thoughts on Presenting an Effective Oral Argument*, [1997] SCH. L. IN REV. 7-1 ("Be particularly skeptical of advice on how to argue an appeal from appellate judges. . . . Judges have no interest in the court['s] reaching a 'wrong' result, but fifty percent of clients do."); *contra* Randall T. Shepard, *The Special Professional Challenges of Appellate Judging*, 35 IND. L. REV. 381, 391 (2002) (arguing that real judges are often more aggressive in moot court than in actual oral argument).

[106] Noting that "[v]ideotapes are ruthlessly honest," three authors recommend "videotaping a practice argument" to get speakers to stop "fiddling with hair; waving glasses around; sucking on the bow of one's glasses; rubbing the back of one's neck or one's chin [; and] the tendency . . . to put their hands in their pockets and jingle their change or keys." CLARY ET AL., *supra* note 47, at 127.

[107] If the competition has a criminal-law issue, for example, the advocate should consider asking an assistant district attorney or criminal-defense lawyer to do practice rounds. It might even help to ask law-enforcement officials to do practice rounds to provide a perspective on how the substantive issues might arise in the real world.

[108] SCALIA & GARNER, *supra* note 36, at 158.

[109] GAUBATZ & MATTIS, *supra* note 48, § 4.4(b)(ii), at 108.

confidence boost to the advocate, although this might not be feasible if a competition is out-of-town. At an out-of-town competition, if possible, advocates should scope out the moot court room where they will argue, test the acoustics, and make sure their notes fit on the podium or lectern, if there is one at the competition.

Advocates who are nervous should jog in place during their practice deliveries to accustom themselves to a high heart rate. Lowering a heart rate by running in place will not work for everyone, but it will work better than taking a shot of vodka before a round, a crutch of which we wholly disapprove. Although many of us are too afraid of public speaking to succeed at moot court, nervousness for the rest of us should decrease with practice and with the confidence of knowing that the advocate will know more about the facts and law of the case than the judges by the time the competition starts.

Wherever they practice, advocates should practice with both hot and cold benches to prepare themselves for hot and cold rounds. Advocates should practice standing close to and far from the judges to practice projecting their voices. It is important to practice within a competition's time limits, but it is also beneficial to hold some untimed practice rounds. Untimed practices allow advocates to hear as many questions as a bench has, to be questioned on every part of their argument, and to receive feedback on their entire argument. Essential to the process, too, is that advocates practice without notes to prevent over-reliance on them. As advocates practice and refine their arguments, their points and responses will become clean, clear, and precise. In an early practice round, it might take several minutes of speaking and responding to questions before advocates convey the holding they want. After more practice rounds, advocates will be able to state the desired holding clearly, without hesitation, and quickly.

Advocates will also improve their ability to ask for relief succinctly by serving as judges in their colleagues' practice rounds; advocates thus come to appreciate what a judge wants and can structure their responses to questions accordingly.[110] Advocates should listen carefully to the feedback they receive from practice-round judges. Oftentimes, advocates will hear the same critiques, which will enable advocates to rectify the persistent problems in their presentations. By the final practice, advocates should be able to answer questions and hypotheticals concisely, defend their answers confidently and without evasion, and transition back to their points efficiently. Advocates who have completed practice rounds will also be more likely to be in the moment during the competition—and avoid the flustered forgetfulness one sometimes sees in competitors, in which they can forget for a few seconds even which side they represent.

IV. DELIVERY

Thus far, advocates have been preparing to deliver a persuasive argument to the moot court on substantive legal issues. After weeks of writing and oral argument practice, advocates

[110] *Id.* § 4.4(c), at 108-09.

are well-versed on the legal issues and the record and are ready to deliver a persuasive legal argument. But because a moot court tournament is a competition in which advocates are graded on both the substance of the arguments they make and on their presentations of their arguments, advocates are under a microscope from the moment the moot court judges enter the room. Every movement and word has the potential to make a positive or negative impression on the moot court judges.

To deliver a winning oral argument, advocates must strive to connect with their judges positively. In other words, the judges must like the advocates. Although there is no formula to being liked by a judge, the best practice is to behave and speak in a way that shows that the advocate likes the judge. If the advocate succeeds in doing so, the judge in return will like the advocate back, and will show it with a high score. Such is human nature: You like people if they like you. To make a judge like an advocate, the advocate should dress appropriately, act professionally, have good manners,[111] make eye contact, be passionate about the case, speak confidently and not quickly, smile charismatically from time to time, and engage in respectful yet engaging conversation with the judges.

A. First Impressions

Because the judges will see the advocates before they hear them, advocates should make strong first impressions by appearing ready for an intellectual and friendly conversation. Advocates can do this by dressing well,[112] wearing dark, conservative colors and avoiding fancy, heavy, or loose jewelry and other accoutrements that could distract the court or clang or the lectern or podium. Advocates should wear their hair short,[113] be neatly groomed, and carry themselves in a way that conveys dignity and respect for the court. When the judges enter the room, whether or not the clerk or bailiff begins with a few knocks on the door and an oyez, advocates should rise from their respective counsel tables with jackets buttoned[114] and remain standing until the chief justice/judge, clerk, or bailiff indicate they may sit down. When the bailiff calls the case, the bailiff or judges might ask whether the advocates are ready to proceed. All team members should stand and reply together and at the same time in the affirmative.[115] If

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[111] Vaughan, *supra* note 45, at 669 (discussing the importance of treating the proceedings, panel, and opposing counsel with respect) (citing GAUBATZ & MATTIS, *supra* note 48, § 4.3(b)-(c), at 101-03).

[112] The advocate's attire can directly affect success in a moot court round. *See, e.g.*, Dimitri, *supra* note 31, at 102 (stating that advocates should err on the side of caution by dressing in a dark, conservative business clothes and avoiding "provocative ties, shirts, blouses, and shoes"); Barger, *supra* note 42, at 16 (arguing that clothing and jewelry that attract the court's attention is unhelpful in winning a moot court round). Conservative dress is ideal. It reflects a reverence for the court and will not distract the judges during the argument.

[113] Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 U. KAN L. REV. 631, 660 (2009) ("[A]ttorneys should be mindful that that speakers with short hair, regardless of gender, are generally perceived as more credible."). Professor Higdon's article is a must-read for all who care about oral advocacy.

[114] Suit jackets should always be buttoned when standing.

[115] Advocates are assessed not only on what they say but on how they say it. They should avoid informalisms ("yeah") and dialect ("ain't"). SCALIA & GARNER, *supra* note 36, at 144.

the court addresses the advocates in some other fashion or by some other inquiry, either individually or as a team, advocates should always stand when the court addresses them.

If advocating for the petitioner/appellant, the first advocate to speak should immediately approach the podium or lectern as the others take their seats. If advocating for the respondent/appellee, the advocate should proceed to the podium as the second speaker for the petitioner/appellant approaches his or her seat. Advocates must approach the podium or lectern in a brisk but unhurried manner.[116] If necessary, advocates should adjust the lectern or microphone, if there is one, before they begin to speak. They should stand erect with both feet on the ground, usually about shoulder length apart. If height allows them to do so comfortably, they should rest their hands on the lectern or podium. Advocates' hands should not be in their pockets. Once at the lectern podium, the advocate should await the chief justice's or judge's instructions, or at least a nod, to begin the argument.[117] After getting the chief justice/judge's signal to begin, the advocate should pause briefly and, while pausing, make eye contact with all the judges. Then, with a warm smile, the advocate should begin.

B. Professional Behavior and Good Manners

Moot court advocates are judged not only on how they address the court and how they present themselves, but also on how they respond to opposing counsel. Good advocates treat the bench and their adversaries with respect and dignity. Advocates must remain professional during oral argument, even when the argument does not go as anticipated. They should not raise controversy unnecessarily by including frivolous arguments. Advocates will lose points if they personally attack or embarrass their moot court adversaries or even personalize the argument by referring to their adversaries by name, even if with a title. Advocates should refer to the opposing party instead of to their counsel (*e.g.*, "respondent" rather than "respondent's counsel" or, worse, "my opponent"). Advocates should maintain a dignified and respectful appearance while sitting, keeping still and silent while their co-counsel and adversaries speak. They should not distract the bench or opposing counsel by excessively passing notes, reacting negatively to opposing counsel's argument (*e.g.*, shaking head, rolling eyes, smiling derisively), or sorting through papers.[118] While their adversary is speaking, opposing counsel should sit upright and listen attentively to the argument, looking only at the speaker or the bench[119] and never at the audience, lest anyone think that they are seeking a clue from someone in the

[116] *Id.* at 164.

[117] Advocates might be expressly told to begin, or they might get something as simple as a head nod or a smile to indicate they should begin.

[118] *See* SCALIA & GARNER, *supra* note 36, at 162 ("[T]his is no time to joke or horse around with cocounsel. Sit erect, eyes fixed on the court, with the closest you can manage to an expression of sober anticipation.").

[119] *See* Brian Wice, *Oral Argument in Criminal Cases: 10 Tips for Winning the Moot Court Round*, 69 TEX. B.J. 224, 227 (2006) ("It is also considered intemperate to engage in whispering at counsel table while your opponent is arguing or to display any facial expressions calculated to show your contempt for or disbelief of your opponent's remarks or the court's questions.").

audience about whether to rebut. Their hands should be folded on the table or in their lap. Advocates should write notes only to the extent necessary to prepare for a rebuttal.

Advocates should hydrate before they step up to the lectern or podium, but they may bring water if they think they will get thirsty or need hydration to relieve a parched mouth, and then drink only when they are asked a question so as not to interrupt the flow of their argument. Nervous advocates should avoid water altogether while they argue, lest they spill some on themselves during the round.

When the round has concluded and the judges have completed their decision or evaluation/comments,[120] advocates should congratulate their adversaries on their performance and shake their hands. Advocates should also greet the judges, shake hands with them, and thank them for serve as moot court judges. Advocates should not tell the judges which school they are from unless they are overwhelmingly certain—a rare occurrence until after the final round—that it is permissible and honest to do so. Although these post-argument pleasantries will not affect the scoring, they show professionalism and courtesy. In many competitions, judges return from year-to-year and even judge later rounds in the same competition. It is important that the judges remember advocates as professional and courteous. Advocates should respond even to scathing critiques from judges with attentiveness and openness. Professionalism reflects not only on the advocate but also on the school the advocate represents.

C. Style

Another element of persuasion is style. Style involves body language, facial gestures, speech inflections, pace, and eye contact. The effect of style on an advocate's persuasiveness begins before the formal argument begins. For example, after the advocates have taken their seats at their respective tables[121] and the bailiff has called the court to order with the standard moot court oyez opening, the petitioner/appellant should stand up, push in the chair, and button the suit jacket while confidently approaching the lectern or podium. Although the advocate has not spoken yet, the judges have likely begun their evaluation of the advocate, and by implication the advocate's argument, based on the advocate's non-verbal conduct.

[120] Once the round is over, advocates should feel free to ask the judges questions in response to their comments, but they should limit their questions to those that will elicit constructive criticism. Advocates should not make a judge feel defensive or argue with a judge's comments or criticisms.

[121] When facing the bench, the petitioner/appellant sits at the table on the left, and the respondent/appellee sits at the table on the right. The first speaker on each team—petitioner/appellant I and respondent/appellee I—sits closest to the podium. The correct style, although one not calculated to keep the arguments and counter-arguments simple, is for the entire petitioner/appellant team to speak before the respondent/appellee team speaks. The logical, but incorrect, style is for the advocates to speak in the order of the moot court issue, with the petitioner/appellant I going first; then the respondent/appellee I; then the petitioner/appellant II; and finally the respondent/appellee II. Although that is the default format, advocates should do what the host or judges want them to do and, as in all forms of successful advocacy, be flexible.

At the lectern or podium, advocates should have straight posture. Advocates should not move their feet, sway, or shimmy while speaking or resting their weight on the podium. Advocates should keep with both feet straight and even on the ground. Their feet should be even with their shoulders. Advocates whose bodies sway, however, should place their feet should be a few inches wider than their shoulders. Advocates should be aware of their body movement, from their hands to their feet. Although a rare but small and natural finger, hand, eye, eyebrow, or shoulder gesture can help an argument, particularly when an advocate is trying to make an important point, too much motion will distract the judges.[122] Raising a hand to emphasize a point is effective, as is holding out each hand in succession to indicate two aspects of a point.[123] When used, hand gestures should be consistent with the advocate is saying. Hand gestures should be at chest level or lower. Advocates should never show hostility or disapproval by pointing, crossing their arms, or putting their hands on their hips. Overused gesturing, or gesturing that is inconsistent, or out-of-sync, with what is being said, will take the judges' focus off the substance of the argument and instead deflect attention to the distracting movement. Advocates who talk with their hands should be taught to keep hand gestures to a minimum. The advocate should be make the judge focus on the advocate's shoulders and head and to listen to what advocate has to say. Thus, advocates should never distract, however inadvertently, by tapping on the lectern or podium. But good hand movements that show respectful confidence include steepling—placing fingertips together to form a church steeple—and palms-up gestures.[124]

Unless multiple judges ask successive questions, advocates should not take notes while at the podium or even hold a pen. If successive questions are asked, however, advocates might find it helpful to take brief notes about each judge's question to ensure that all the questions are answered, with the advocate scanning the entire panel and stating something like "To answer Judge 's ----- question first . . . ." or "To answer the questions in the order received . . . ." Failure to answer all the questions will result in a reduction of points from the judge whose question went unanswered, causing that judge to feel slighted.

Throughout the oral argument, advocates should aim for a tone of respectful equality in their conversation with the judges.[125] Being overly obsequious reflects a lack of confidence that raises red flags to the judges about the merit of an advocate's argument. An overly obsequious tick, for example, is to say "Your Honor" too often; four or five times in a round is enough. At

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[122] Kritchevsky, *supra* note 29, at 70 (citing DWORSKY, *supra* note 62, at 40); Rychlak, *supra* note 96, at 535).

[123] MICHAEL R. FONTHAM, WRITTEN AND ORAL ADVOCACY § 8.21, at 190 (1985).

[124] Higdon, *supra* note 113, at 647; *see also* Harold Hongju Koh, *Ten Lessons About Appellate Oral Argument*, 71 CONN. B.J. 218, 222 (1997), who explains how to project correctly a respectful tone during an appellate argument: "What they tell you: be respectful. What does this actually mean? Not pandering, not overly formal. The best description I've heard is: use the tone that you would use when you're initiating conversation with an elderly relative from whom you seek a large bequest. It is very important to make your presentation informal and conversational—like a seminar, not a lecture."

[125] PHILIP A. LACOVARA, JAMES E. BARZ, JOEL D. BERTOCCHI & TIMOTHY S. BISHOP, FEDERAL APPELLATE PRACTICE 458 (2008).

the same time, being overly confident is unlikely to score points with the judges. The judges will think that an advocate who smirks is trying to be smarter than them.

Despite its name, an oral argument is not supposed to be an argument. Nor is it supposed to be an oral recitation of the brief.[126] Rather, it should be a deferential conversation with the bench. Although advocates may bring notes with them to the podium, they should not read from them. Reading suggests that the advocate is unprepared, and reading causes nervousness and makes speakers talk too fast. Reading also reduces eye contact with the bench, which stifles the conversation and prevents advocates from recognizing when a judge wants to ask a question. Maintaining eye contact with the entire bench is essential because it enhances credibility, encourages the judges to pay attention to the speaker, and makes the judges believe that you like them, all factors that raise a moot court score. Eye contact is also important because the judges' expressions can indicate whether they understand the argument and whether they like or dislike what the advocate is saying. Advocates should maintain eye contact even with those judges who ask relatively few questions; even those judges score. Occasionally (but only occasionally), addressing the judge by title and surname (*e.g.*, "Justice ----") is a fine technique, but advocates must be sure to pronounce names correctly. Using names shows the advocate is engaged in the moment and can endear the advocate to the judge: Everyone's favorite word, after all, is their name.

During the conversation, advocates should be formal yet relaxed; speak clearly and in plain, simple Anglo Saxon English; eliminate hesitant speech; and show enthusiasm and passion for their case without being aggressive or defensive. Advocates should not shout, but they should speak with moderate loudness, project from the diaphragm, and lower the range of their pitch. Advocates must work on any annoying speech pattern: They should slow themselves down if they talk too quickly (moderate speed is preferred), avoid a Staccato-style effect of long pauses between quickly-spoken words,[127] and not speak with their voices going up at the end of a sentence as if they are asking questions. Advocates should want judges to focus on their words instead of their speaking style.[128] When nervous advocates begin a thought other than the one they intended, their nervousness will be made obvious if they correct themselves mid-sentence: It is less distracting to the judge if the advocate finishes the thought a bit clumsily instead of starting over or self-editing.[129] Besides, on the principle that it is more important to be liked than to be right, the judges will score more highly an advocate

[126] *See* Kritchevsky, *supra* note 29, at 67 ("Not only do court rules counsel against reading, but a participant in a conversation does not read a script.") (citing SUP. CT. R. 28(1), which provides that "[o]ral argument read from a prepared text is not favored").

[127] MURRAY & DESANCTIS II, *supra* note 39, at 265.

[128] Karen J. Williams, *Help Us Help You: A Fourth Circuit Primer on Effective Appellate Oral Arguments*, 50 S.C. L. REV. 591, 598 (1999).

[129] Gerald Lebovits, *Winning Oral Argument: Do's and Don'ts*, 72 Queens B. Bull 13, 13 (Nov. 20, 2008) [hereinafter Lebovits II], *available at* http://works.bepress.com/gerald_lebovits/134/ (last visited Nov. 20, 2012).

who errs but then smiles than the advocate who self-corrects, is defensive, or looks mean or disgruntled after making a mistake.

Advocates should aim to be natural in tone. A friendly person should be a friendly advocate, and a serious person should be a serious advocate without scowling, staring, or glaring at anyone, especially the judges. Advocates should vary their tone, speed, inflection, and volume to emphasize an important statement and to keep the judges alert.[130] Advocates should not be monotone.[131] Advocates should avoid planned jokes or complicated metaphors, although spontaneous humor at an advocate's own expense is acceptable. Advocates should politely laugh at jokes a judge makes if they can do so without laughing too hard or seeming stiff or obsequious. Advocates should not change their personalities just because they are arguing a case before a bench. "Be yourself" is simplistic advice; many individuals tend toward distracting gestures, facial expressions, and voice modulations when speaking in public, especially if they are nervous. Advocates should be aware of their weaknesses and try to correct them through practice. Advocates should aim to be "more polished version[s]" of themselves.[132] Whatever the style, advocates should be articulate, comfortable, and respectful.

Regardless of personality type, advocates must speak with conviction to show that they believe what they are saying, even if they do not.[133] Advocates convey conviction by making direct assertions rather than metadiscursive ones like "I am arguing that . . . .," "I believe that . . . .," "I feel that," "I think that," and "Petitioner contends that . . . ."[134] The goal is to forget the wind-up and just deliver the punch. Besides, these empty, introductory, and non-affirmative phrases distance the advocate from the client.[135] Advocates should also avoid adverbial excesses like "clearly," "certainly," and "obviously," which both insult the listener's intelligence[136] and raise the burden of proof or standard of review. Why must a litigant who should be happy simply being right try to be clearly right?

Advocates should avoid prefatory comments. These comments include reminders like "as I said before" and "as I mentioned previously." They suggest that the judge was not

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[130] HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 491 (5th ed. 2008).

[131] Rychlak, *supra* note 96, at 537 ("Closely associated with the problem of speaking too fast is the problem of being monotone. Good speakers vary tempo as well as the volume of their voice.") (recommending drills to work on inflection).

[132] DWORSKY, *supra* note 62, at 24.

[133] Vaughan, *supra* note 45, at 675.

[134] SCALIA & GARNER, *supra* note 36, at 184.

[135] CLARY ET AL., *supra* note 47, at 123 ("Not only are such phrases inartful and wasteful of the precious minutes you are allotted, they have the effect of making it appear as if you may not really be standing behind your client's position—that you merely are paying lip-service to arguments your client has instructed you to make.").

[136] Most good moot court problems present questions of law for which there is a relatively equal split in authority. For example, two circuits might be on one side of an issue while another three circuits are on the other. Asserting that the issue is "clearly" or "obviously" one way or the other conveys disrespect toward the courts. The circuit splits, moreover, are themselves evidence that the issue is not so clear. The advocate who uses the "clearly" can expect the moot court judge to comment, "If the answer were clear, why are you here?"

listening to the advocate[137] or is stupid. Either implication is undesirable. Advocates should not repeat questions; doing so highlights nervousness. Additionally, advocates should eliminate filler words and expressions like "uh," "um," "you know," and "like."[138] One way to avoid fillers is to stand before a mirror and say the word or expression 100 times. Advocates should also eliminate cowardly qualifiers like "usually," typically," and "generally" unless they want to give both the rule and then the exception. It is worse to be cowardly than to be wrong. A cowardly qualifier might lead to a deduction in points because moot court advocates may not equivocate in answering a question. On the other hand, the judges might not notice a small mistake or even believe that the mistaken point is the correct one, especially if the advocate says it confidently enough.

When answering a question or trying to resume their argument after getting off-track, advocates should pause briefly and reflect silently on what they want to say instead of stumbling through a sentence filled with "ums" and "uhs." Not only do short, though minimal, silent pauses remove the need to use filler words, they may even score points with the judge who asked the question. By pausing, advocates give the impression that they appreciate the question and are preparing thoughtful answers or arguments.[139] But advocates should not pause after answering a question or ask the judge whether they sufficiently answered a question. Doing so is impolite and shows lack of confidence, and hesitation and tentativeness invite more questions anyway.

Advocates must also be scrupulously honest. In oral advocacy, honesty means understatement; understatement is an essential attribute to persuasion. The opposite of understatement is exaggeration. Advocates must never exaggerate facts or legal authority.[140] If the fastest way to lose at moot court is to violate a competition rule, the second fastest is to get caught misstating or misrepresenting fact or law.

One way to show honesty is for advocates properly to address, especially in response to a judge's questions, matters not in the record. It often happens that a judge will ask about things not in the moot court fact pattern. The advocate should tell the judge something like, "The record is silent on that, Your Honor, but a fair inference from the record is that. . . ."

If an advocate does not know an answer to a question, the advocate might offer to submit a supplemental memorandum, some suggest.[141] This is a practical solution in real

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[137] Dimitri, *supra* note 31, at 104-05 (noting that "As I said before" or "As I said earlier" can be interpreted as "Why weren't you listening to me before?").

[138] MURRAY & DESANCTIS I*, supra* note 1, at 453 ("These phrases are distracting and can make the judge tune you out. Worse yet, the judge might start a score card with how many 'uhhh's' and 'ummm's' you say in your argument; take it from us—that judge is not paying proper attention to the substance of your argument any more."),

[139] Dimitri, *supra* note 31, at 96 ("Some judges may even be flattered that you are displaying some thoughtfulness about their questions by pausing before you answer them.").

[140] MYRON MOSKOVITZ, WINNING AN APPEAL § 5.5, at 74 (4th ed. 2007).

[141] *See, e.g.*, LACOVARA ET AL., *supra* note 125, at 462.

advocacy; supplemental briefing in an ongoing case is common. But in a moot court competition, it is merely a canned response that highlights the advocate's shortcoming in terms of knowing the facts or the law. A better strategy is to return to the theme to find the answer or, if all else fails, to admit ignorance, smile, and move on quickly.

V. STRUCTURE OF THE ARGUMENT AND GOING THROUGH IT

Advocates should, as they do in their briefs, strategically structure their oral argument so that it is clear, organized, and fluid. Although advocates should not read their arguments or recite a memorized speech, they should memorize their introduction and roadmap so that they can establish eye contact the moment they start speaking.[142]

Because advocates have the court's maximum attention at the start, they should begin with information that facilitates the conversation and effectively states their position. In a standard moot court introduction, an advocate introduces himself or herself and co-counsel and identifies the party represented. The introduction may proceed along these lines: "Chief Justice/Judge, Your Honors, and may it please the Court.[143] My name is ----- and together with ------ (*counsel offers a hand gesture in co-counsel's direction while co-counsel stands as introduced and then sits down*), I represent the petitioner/appellant, ------." The petitioner/appellant then asks the court to reserve time for rebuttal: "Chief Justice/Judge, petitioner/appellant respectfully requests [or reserves] two minutes for rebuttal."

Advocates must avoid emotional appeals. Some advocates begin by saying, "This case is about -----," but beginning that way invites questioning and excites controversy too early in the argument, when the advocate must try to get through the roadmap without a judge's hostile interruption. Saying "this case is about" might cause some tough judge to say "No. Isn't this case really about your adversary's point that . . . ?" Besides, unlike juries, judges are concerned with the rule of law and the ramifications of the rule.[144] Judges do not want to be pigeon-holed into an either/or debate.

After asking for rebuttal time, the advocate should describe in one sentence and a conclusory and argumentative way the issue that co-counsel will address (*e.g.*, "Co-counsel will argue that the trial court erred by . . . ."), followed by the issue that the advocate will address ("While I will argue that. . . ."). It is a lost opportunity to begin neutrally by saying "My co-counsel will argue the first issue [or the First Amendment issue], while I will argue the second issue [or the Fourth Amendment issue]."

The advocate should then devote one, two, or, at most, three short sentences giving facts or procedure that help the argument. The facts should be determinative facts, meaning

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[142] One way to memorize a script is to write it out a few times by hand and then to practice it until the speaker recalls by heart every syllable in the script.

[143] *See* MURRAY & DESANCTIS I, *supra* note 1, at 442 (noting that if a speaker bucks the "may it please the court" convention, the judge might "view [the speaker's] free-spirited thinking as rebellion").

[144] *See* SCALIA & GARNER, *supra* note 36, at 32.

that they must be the most essential facts favoring the advocate's client in obtaining the relief sought. The facts offered should not be opinions or conclusions; they must be facts and facts only. These facts offer context, help those judges unfamiliar with the case, and offer a winning platform from the start. An example of giving the facts and offering the requested relief: "---- [fact], ---- [fact], and ---- [fact]. Despite those facts, the trial court decided that ----. We therefore ask this court to reverse the trial court's decision and remand for a new trial. First . . . ." Only a novice—or someone with a novice for a coach—will ask the judges: "Would Your Honors like a brief recitation of the facts?" Advocates should avoid embarrassing moot court judges by asking them questions.[145] Asking the judges whether they want to hear the facts, moreover, might be a losing proposition. If the judges say no, they might do so in a way that will embarrass the speaker, such as by harshly saying, "We're familiar with the facts, counselor. Move on." Or if the Chief Justice/Judge says yes—that the panel would like to hear the facts—it will be to pacify the speaker, not because the judges want to hear the facts, and then, after the advocate wastes a precious minute or two meandering through the facts, the judges, tired, will inevitably interrupt the advocate anyway with a harsh "We're familiar with the facts, counselor. Please move on."

Immediately after giving the determinative facts, the advocate should state the relief the client seeks—to affirm, modify, or reverse—with the following: "Therefore, this Court should affirm the decision of the Court of Appeals for the Second Circuit [or modify or remand for a new trial]." The advocate should not use "lower court" when arguing before the Supreme Court. Unless the court to which the argument is being made is a court of intermediate appellate jurisdiction, there will be two "lower courts," and the judges will not know to which the advocate is referring. Precision is important.

Then the advocate must give two or, maximum, three reasons why, without saying "for two reasons." The reasons must be emphatically short, pointed, and outcome-determinative.

The advocate has now finished the roadmap, a table of contents that tells the court how it should rule, why it should rule that way, and how the discussion should progress. It provides structure and clarity to the argument and assists the judges in understanding the main points. It will take immense practice to nail down a perfect roadmap—one that last not a fraction longer than sixty seconds—but the effort is worth it.

If a judge interrupts with a question during the roadmap, the advocate should answer it quickly, but adequately, and return to the roadmap. If too much time has passed, the advocate should just continue with the argument.

Once the first speaker on the petitioner/appellant team has finished, the second speaker should introduce him- or herself along similar lines ("Chief Justice/Judge, Your Honors, and may it please the court. My name is ----- and I also represent the petitioner/appellant, -----).

[145] ALAN D. HORNSTEIN, APPELLATE ADVOCACY IN A NUTSHELL § 8-2, at 242 (2d ed. 1998) ("[Q]uestions initiated by the advocate to the court are simply inappropriate.").

The second advocate should then quickly give the facts, state the relief requested, and give the two or three reasons why the client should win, just like the first speaker did.

Advocates should begin with their strongest point, even if this point did not surface first in the brief or the roadmap. If the court proceeds to question advocates intensely, advocates will have at least made their best argument.[146] Advocates who are respondents/appellees should pay close attention not only to their adversaries' arguments but also to the questions the court asks of the appellants/petitioners; the questions will indicate which aspects of the appellant/petitioner's case are problematic to the court.[147] If the court seems to be looking at the appellant/petitioner's arguments unfavorably, the appellees/respondents can move quickly into their own arguments without undermining their adversaries' arguments further.[148] If the appellant/petitioner has raised issues of jurisdiction, however, the appellees/respondents should address those immediately, before presenting their own substantive arguments.[149]

Advocates should use their time wisely to stress the most important reasons why the court should rule in their favor. To do so, advocates should be mindful of the time cards without being distracted by them.[150] Although the judges' concerns are important, advocates should not neglect major arguments for the sake of answering questions. The judges ask the questions, but the advocate must retain control or lose a dramatic number of points. The same judge who asks questions and makes comments with the intent to seize control from the advocate will deduct points when the advocate loses control. Some moot court judges use rapid-fire questioning to test whether advocates can maintain control of their arguments. Other judges do so because they are obnoxious people who want to hear their own voices instead of hearing from students. Advocates will earn points if they can remain composed and continue to move through their arguments. This balancing act requires the advocates to keep track of how much time they spend on each point and how much time is left to address remaining points. Generally, by the five-minute remaining mark, advocates should be on their last point. If they have not covered an important point by this time, they should move the conversation to it.

Advocates should avoid lengthy quotations; spoken block quotations are as distracting to a listener as they are to a reader. A short quotation from a case or from the fact pattern may, however, be a useful reference to amplify support for the argument.

Advocates should cite cases in support of the argument, but only when they know the facts of the cases they cite. It is one thing not to know the facts of a case about which a judge asks. It is another not to know the facts of a case the advocate raised. And the judges often ask about the facts of a case. Sometimes they ask about the facts to show that the advocate's

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[146] BRYAN A. GARNER, THE WINNING ORAL ARGUMENT 133 (2009).
[147] SHAPO ET AL., *supra* note 130, at 488.
[148] SCALIA & GARNER, *supra* note 36, at 170.
[149] *Id.* at 171.
[150] In a typical fifteen-minute presentation, the clerk or bailiff will raise the time card at 10, 5, 3, 1, and "Time."

citation is inapposite. Sometimes they ask about the facts of a case because they do not know what else to ask about.

When moving between points, advocates should clearly indicate that they are doing so. For example, after finishing a discussion on their first point, advocates should transition explicitly to their second point—perhaps saying, "This brings me to my second point."

Important, too, is that in going through an argument, each advocate must address the other side's contentions. The petitioner/appellant does so to lay a minefield for the respondent/appellee. The petitioner/appellant's goal is to have the judges repeat its point to the respondent/appellee. The respondent/appellee goal is to throw the bombs right back at the petitioner/respondent and perhaps even get a judge to use the respondent/appellee's point to question a petitioner/respondent during any possible rebuttal.

VI. ANSWERING QUESTIONS

"A question is an invitation to persuade."[151] Advocates should encourage questions and use them to engage the bench and clarify any concern the bench might have about a particular issue. It is an opportunity to persuade the court to adopt a client's viewpoint. In a typical competition round, judges repeatedly interrupt advocates with questions.[152] Questions in preliminary rounds of moot court competitions tend to focus on the facts, while later rounds with more seasoned moot court judges tend to be more law- and policy-driven. Advocates should welcome a conversation with the bench.[153] Questions from judges give advocates a chance to persuade them by supporting answers with information that helps the court understand the argument and rule in the advocate's favor.[154] It also allows for personal interaction and enables the advocate to persuade the judges not only to believe the argument but also to like the advocate.

With one exception explained later, the moment a judge asks a question (or even hints at a desire to ask a question, verbally or by facial expression), the advocate must immediately cease speaking, even in mid-syllable and even if the judge is being rude. Speaking over a judge is one of the worst mistakes an advocate can make, both in a moot court competition and in any judge's courtroom. The judges are the masters of the room; they score the competitors, not the other way around. It is essential for advocates to remember that deference to the judge is mandatory. Besides, an advocate who speaks over a judge signals that the advocate does not

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[151] Wice, *supra* note 119, at 228 (quoting Justice Robert Jackson); Vitiello, *supra* note 9, at 890 (arguing that questions from the bench give counsel the opportunity to persuade the court).

[152] Dimitri, *supra* note 31, at 95 ("Rarely is an oral argument uninterrupted by questions from the bench."); Vaughan, *supra* note 45, at 670 ("It is normal for an oral advocate to be interrupted by questions.").

[153] *See* Wice, *supra* note 119, at 228. To welcome a question is never to get defensive in response to a question. *See, e.g.*, Lawrence W. Pierce, *Appellate Advocacy: Some Reflections from the Bench*, 61 FORDHAM L. REV. 829, 840 (1993) ("One of the serious mistakes counsel can make while arguing an appeal is becoming defensive. . . .").

[154] Vaughan, *supra* note 45, at 676; Vitiello, *supra* note 9, at 891 ("[E]ngaging the court in a dialogue during which counsel effectively addresses the court's concerns is the primary tool of the successful oral advocate.").

like the judge, who will then give the advocate a poor score, both for ignoring accepted norms of courtroom decorum and for being impolite.

How an advocate answers questions will, more than any other factor, determine whether the team will win or lose. Advocates must listen carefully to the question,[155] understand it, and address it directly. Advocates must warmly welcome the question, and never show annoyance or frustration. Advocates may not resist a question or evade an answer. Every yes-or-no question must begin with a "yes" or "no" answer[156] and be followed with the reason, which might include supportive facts from the fact pattern and a citation to the law. And although advocates must answer succinctly and concisely, they must also answer fully and completely.[157]

Some questions are designed to present a "devil's advocate" position to see whether the advocate can defend the position asserted.[158] These questions, while the most difficult of all, present some of the best opportunities for the advocate to score points. The advocate should answer the question in a conciliatory way when the judge is right and offer a fact, statutory provision, or case to supports the judge's point but then segue back to the original argument. The advocate's goal is to use a judge's question to the advocate's advantage.

Advocates must recognize when a judge is trying to assist them by using the question to direct the advocates to a stronger argument.[159] The judge might be attempting to make a point to colleagues on the bench indirectly through an advocate's answer. Advocates should not assume that a softball question is a trap.[160] Advocates must know the difference between a softball and a hand grenade.

Advocates should also be prepared to handle unclear, irrelevant, or rapid-fire questioning. Advocates who do not understand the question may politely ask the questioner to clarify it. Advocates should err on the side of not asking for clarification, though, because they

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[155] William H. Rehnquist, *Oral Advocacy*, 27 S. TEX. L. REV. 289, 302 (1986) ("If you are going to be able to intelligently answer a question, you must first *listen* to the question.").

[156] *See* Vitiello, *supra* note 9, at 889-90 (asserting that the proper response to a "yes" or "no" question from the bench is "a direct 'yes' or 'no' answer"); Williams, *supra* note 128, at 599 ("Respond immediately to a question with a 'yes,' 'no,' 'it depends,' or 'I don't know.' Follow the short answer with a concise explanation and citation to the record or precedent as necessary."). As one Moot Court Board tells the students who compete in its intramural competition, "Don't stack laws before answering a question—first answer the question, then cite authority to support the proposition." New York Law Sch. Moot Ct. Ass'n, 2012 Charles W. Froessel Intramural Competition, *Tips for a Successful Oral Argument* 2, *available at* http://www.nyls.edu/user_files/1/3/4/184/1293/Moot%20Camp%202012%20Packet-2.pdf (last visited Nov. 20, 2012) [hereinafter New York Law School Tips].

[157] MURRAY & DESANCTIS I, *supra* note 1, at 459 (noting that "[c]omplete answers are better than quick answers").

[158] *See* Wice, *supra* note 119, at 229.

[159] *See* Barger, *supra* note 42, at 17 (observing that advocates who "[t]reat every question as a hostile one" are unlikely to win a moot court round); Wice, *supra* note 119, at 229 ("The worst mistake you can make is to fail to detect a softball question and hit it out of the park.").

[160] LACOVARA ET AL., *supra* note 125, at 466.

risk embarrassing a nervous judge who asked a clumsy, inarticulate question. The embarrassed judge and the judge's friends on the panel might reward the advocate with a poor score. To avoid questioning a judge directly, a courteous way to invite clarification is to preface an answer to an unclear question with "If Your Honor is asking whether -----, then -----."[161] An advocate should never confront a judge by suggesting that a question is irrelevant; the advocate should answer briefly and return the court's focus to the main issues, assuming that other judges will pursue the question if there is hidden relevance.[162]

Questions should be answered directly and concisely but in a manner that supports an advocate's case. Advocates should not fawn over a judge's question (*e.g.*, "That's a brilliant question, Your Honor!").[163] If pressed and questioned on the facts, advocates should give page numbers from the record. Advocates who give page numbers during their main argument, however, look like show-offs. Advocates should not give a more complicated answer than necessary and which potentially invites more questions.[164] Advocates need not give the whole citation to the court; the court's name and the date of the decision will suffice. They should state the "v." in case citations as "versus" (not "vee"). If a judge asks hypotheticals or policy-oriented slippery-slope, parade of horribles, and worst-case-scenario questions, advocates should still answer with a "yes" or "no," and then distinguish the premises of their own case from those of the hypothetical, if necessary.[165] The advocate should not fight the hypothetical by saying, "But that is not this case, Your Honor." If the rule a team is proposing in its case applies to a judge's hypothetical, advocates should acknowledge this to remain credible and then demonstrate that applying the rule even to the hypothetical facts does not lead to an absurd or unjust result.[166]

Advocates should answer questions immediately and never tell a judge, "I will get to it later." Doing so is inappropriate and disrespectful.[167] Instead, the advocate should answer the question right away, even if the question relates to a different part of the argument and even if the judge asked it because the judge was not following the order of the argument, advertently or because the judge was confused. After answering the question, the advocate must return to argument. Also inappropriate is showing frustration, annoyance, and hostility, such as by telling a judge, "With all due respect."[168]

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[161] *Id.* at 462.

[162] *Id.* at 467.

[163] SCALIA & GARNER, *supra* note 36, at 194.

[164] NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS § 31.05, at 316 (5th ed. 2010).

[165] LACOVARA ET AL., *supra* note 125, at 465.

[166] MOSKOVITZ, *supra* note 140, § 5.5, at 76.

[167] Kravitz, *supra* note 35, at 212 ("Never say, 'I'll get to that later.' The judge wants to explore the issue now, not when you get to page 10 of your outline. . . . The Court will likely lose patience if you try to postpone your response to the judges' questions.").

[168] New York Law School Tips, *supra* note 156, at 2 ("[S]ay[ing] 'with all due respect' . . . is another way to tell the judge he is an absolute moron.").

Nor should advocates follow-up with their answers by asking whether they answered the judges' question.[169] The advocate should move on and hope for the best.

Sometimes judges ask about a teammate's argument. That might happen if the advocate's and co-counsels' issues are related, if the first speaker for each team did not did not give a clear roadmap dividing the issues, or if the judge is confused or unprepared. The advocates must answer the teammate's question. There is a chance that the teammate will be bombarded with other issues, and then the initial judge's concerns will go unresolved. Many judges dislike being told, "My teammate will address that issue." The advocate should be familiar enough with a teammate's issues to offer at least a cursory answer.[170] The advocate can close their cursory answer by noting, "as Mr./Ms. -------, my co-counsel, will address in detail in a few moments." That will put an end to the judge's questioning. The judge will realize that the advocate was asked about the teammate's issue, the judge will be impressed that the advocate knew the teammate's issue well enough to answer a question on it, and the judge will not be embarrassed by being told, by inference, "You idiot. You're asking about my teammate's issue."

When agreeing with a judge, advocates should explain why the judge is correct. When a judge makes a point that contradicts what an advocate said, the advocate should still explain why the judge is correct and then add a "but" statement to recover.

Advocates should not fear disagreeing with a judge or conceding a weakness in their case when conceding means merely acknowledging the weakness. If conceding is appropriate, meaning that it will not affect the ultimate outcome of the case or substantially weaken an advocate's argument, the concession will probably increase an advocate's credibility with the court.[171] Not conceding in the same situation, however, might cause advocates to appear unreasonable and lose credibility.[172] Yet advocates should be aware of questions from judges that specifically invite concessions (*e.g.*, "Counsel, do you agree that . . . ?).[173] Judges use facts or points conceded to rule against advocates. Advocates should be wary of contributing to their own demise.[174]

When answering, advocates should focus on the questioner but maintain eye contact with the entire bench.[175]

Advocates must be prepared for the standard moot court questions. Like questions about the standard of review, discussed earlier, these questions are to moot court what apple

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[169] GARNER, *supra* note 146, at 194 ("Never ask whether you've adequately answered a question. . . .").

[170] RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING § 34.3, at 419 (6th ed. 2009).

[171] Dimitri, *supra* note 31, at 98.

[172] *Id.*

[173] SCALIA & GARNER, *supra* note 36, at 199.

[174] LACOVARA ET AL., *supra* note 125, at 463.

[175] Vaughan, *supra* note 45, at 676 (noting the persuasive value of maintaining eye contact with each judge, even the ones not asking a question).

pie is to America. One moot court standard is, "Counselor, if we rule against you on this point, do you lose?" The advocate must then say "no, because in the alternative . . . ," or "yes, we will lose," and then pause briefly and say, "but we ask you instead to find x because . . . ." Other standard questions are "What rule should we adopt," "What relief are you seeking," and "Are you asking for a bright-line rule that . . . ." Advocates must live and breathe good answers to these questions.

Advocates should remain calm when dealing with an overly aggressive bench that asks long questions and continually cuts off the advocates while they are answering. Although that situation is frustrating, it is important to keep in mind that winning an oral argument in a moot court competition does not mean winning on the merits. Because moot court competitions grade performance, giving full, descriptive answers is less important than how advocates handle being accosted by a rogue judge or bench. Advocates should keep their emotions in check and not abandon their deferential attitude toward the bench. Yet if an aggressive judge is preventing an advocate from answering almost every question, it is preferable to speak over the judge than to remain silent. The advocate might lose points from that judge, but an advocate who says nothing and cannot make a case will lose for sure. The advocate might even get extra points from the other judges for keeping a loudmouth judge in check.

A volley of hostile questions might result from two judges having a "tennis match" with each other—approaching a legal point with different perspectives and using the advocate as the ball to make their points.[176] The advocate should still answer the questions as honestly and courteously as possible, keeping in mind that oral argument is not just a conversation between advocate and judge but also among the judges themselves.[177]

The final and most difficult hurdle when answering questions is transitioning from the answer to an affirmative point.[178] Advocates should not wait for judges to let them return to their main argument.[179] Finding a way to relate the answer to one of the points that an advocate intends to make can be accomplished by thinking of probable questions at the preparation stage and practicing forming answers that bring the discussion back to a favorable point. At a minimum, advocates should strive to relate their answer to their theme and to use the theme to transition back to their argument.

Advocates must listen carefully to the questions the judges ask and the comments the judges make when other speakers are speaking ahead of them.[180] When it is their turn, the

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[176] LACOVARA ET AL., *supra* note 125, at 465.

[177] *Id.*

[178] *See* Bishop, *supra* note 28, at 10 ("One of your greatest challenges at oral argument is making a transition from a difficult or an unfavorable line of questioning back to your own affirmative points."); Dimitri, *supra* note 31, at 97 (stating the same proposition).

[179] LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 374 (5th ed. 2010).

[180] Advocates must also maintain a good poker face during opposing counsels' presentation: "If your opponent makes a great point, do not blanch and furiously start looking up things in your materials in a panic." MURRAY & DESANCTIS I, *supra* note 1, at 468.

advocate can reference during the argument, perhaps in response to a question, the point or question the judge offered earlier. The judges will note how attentive and extemporaneous the advocate was to pick up on the judge's earlier words, and the judge will be flattered with the advocate reference.[181] The advocate should not, however, turn a judge's prior question into a statement, such as by saying "As Judge X argued earlier" when all that Judge X did was ask a question. Judges do not argue. It is impolite to suggest that a judge, even a moot court judge, is biased or has a predetermined position before hearing the entire argument.

VII. CONCLUSION OF ARGUMENT

The typical moot court conclusion flows from the end of the argument and conjures up the original theme. It includes the advocates' major points as justification for their position and ends with the relief sought. Given a few moments after the advocate sees the one-minute time card go up, it is succinct and concise, and it should last for ten to fifteen seconds and not longer. The typical moot court conclusion is canned, repetitive, and boring, however. Even when done well, the judges do not listen to them. These conclusions will not harm the argument, but they will not gain scores either, unless the competition score sheet tells the judges to score a conclusion, in which case advocates should always conclude, even in a canned, boring way, and even if the judges are sure to tune out.

One often sees excellent oral rounds end, not with an advocate's proffering a conclusion, but with an advocate's running out of time answering a question. An advocate should not be upset if the team does not have time to make the typical canned conclusion.

Advocates should feel comfortable concluding the argument naturally, even if additional time remains. A frequent mistake in moot court oral argument is to use all the allotted time, even when the advocate has exhausted the universe of points relevant to the argument.[182] An even-worse mistake is to try squeeze in one more large point in the final seconds of the argument.[183] Advocates should not finish unless they are inside the two-minute remaining mark; a judge might believe that an advocate who ends too early is unprepared. But within the two-minute mark, advocates should stop if they end the argument on a high note, with a strong statement that supports their position. This can be accomplished with a strong answer to a question or an emphasis on the strongest point of their argument. Advocates who end early should say, "If there are no further questions . . . ," smile, and return to their seats. An even better high point occurs when a judge within the two-minute mark says something clever that

[181] Alfonso M. Saldana, *Beyond the Appellate Brief: A Guide to Preparing and Delivering the Oral Argument*, 69 FLA. B.J. 28, 32 (May 1995) (noting that advocates transition effectively when they "pick up on a line of the court's discussion which was unfavorable to appellant but is favorable to appellee").

[182] The judges will be happy if you end a bit early. John W. Davis, *The Argument of an Appeal*, 3 J. APP. PRAC. & PROCESS 745, 756 (2001), *reprinted from* 26 A.B.A. J. 895 (1940) ("[W]hen you round out your argument and sit down before your time has expired, a benevolent smile overspreads the faces on the bench. . . .").

[183] MURRAY & DESANCTIS I*, supra* note 1, at 453 ("A rushed end to the argument will leave a bad taste in the judges' mouths.").

causes everyone to laugh. The judges will like and score well the advocate who defers to the judge and sits down without trying to get the last word in.

Should the time run out, the advocate should immediately stop (unless the advocate has only four or five words left anyway) and ask the chief justice or judge for permission briefly to finish answering a question or thought: "Chief Justice/Judge, I see that my time is up [or has expired]. May I finish my thought [or answer the question]?" After the time has expired, advocates should not request extra time to make a new point or to deliver a prepared, canned conclusion—to which the judges will not listen. When the time card goes up, the advocate is on the judges' time. The judges will not want to hear a canned conclusion when the competition host might have told them to be mindful of the time because another round must take place in their room right after their round ends.

Once the argument ends, advocates should thank the bench with a simple "thank you"[184] or a nod and calmly and deliberately return to counsel table to take their seat.[185]

VIII. REBUTTAL

The best rebuttals are concise and direct. At the beginning of the argument (when the first petitioner begins the presentation), the advocate should ask the chief justice or judge to reserve time for rebuttal. Requesting the chief justice or judge's permission for rebuttal time is essential even if rebuttal time is reserved with the bailiff before the round begins. Otherwise, the judges will not know that petitioner/appellant's counsel will be rebutting. When given, rebuttal may proceed along the lines of "Chief Justice/Judge: Two quick points on rebuttal. First, respondent/appellee argues on the [first] issue [objective statement of issue] that . . . . But . . . . Second, respondent/appellee argues on the [second] issue [objective statement of issue] that . . . . But . . . . Thank you." Advocates should move through rebuttal quickly so that judges will not bombard the advocates with new questions. Effective advocates will attempt to complete their rebuttal in thirty seconds.

Petitioners/appellants should reserve no more than three minutes for rebuttal. Ideally, petitioners/appellants should reserve just two minutes for rebuttal. When the respondent/appellee has completed its presentation, the petitioner/appellant's counsel who is delivering the rebuttal should immediately go to the lectern or podium and wait there until the chief justice or judge indicates that the panel is ready. Once the panel is ready, the petitioner/appellant's counsel should give two brief points, one point on each issue. Each point should emphasize a winning point in the petitioner/appellant's argument or attack a glaring weakness in the respondent/appellee's arguments, without making bold or controversial statements that would provoke questions from the bench.

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[184] Garner, *supra* note 146, at 154 ("If time permits, close by saying 'Thank you.' Then pause briefly. Don't rush from the lectern.").

[185] Kritchevsky, *supra* note 29, at 69 ("It is also important that student advocates recognize that they do not have to use all their allotted time . . . [and] should sit down when they have said what they need to say . . . .").

In real appellate advocacy, the rebutting counsel should point out an undisputed fact that the respondent/appellee overlooked or misrepresented or a legal authority or fact that contradicts the respondent/appellee's arguments.[186] In moot court, rebuttals remind the judges who the advocates for the petitioner/appellant are. In real appellate advocacy, broad, sweeping statements should be avoided. In moot court, the best rebuttals are all about broad, sweeping statements. In real life, rebuttal is not an opportunity to restate an argument.[187] In moot court, an advocate should use a rebuttal precisely to restate a point, especially if their adversaries undermined the validity of that point. In real appellate advocacy, rebuttal is an opportunity to point out the glaring errors and omissions in the other side's argument. In moot court, judges might chide advocates as bombastic if they use a rebuttal to point out minor errors or inconsistencies in their adversaries' arguments.[188] In real life, advocates may use notes on rebuttal. In moot court, advocates must deliver their rebuttals from memory. They should briefly place their hands on the lectern podium before they begin to show the judges that they have no notes. In real appellate advocacy, the best rebuttals are long remembered. The best moot court rebuttals are those the judges forget within ten seconds of their ending.[189]

The moot court rebuttal should be as short and punchy as possible. A quick rebuttal might prevent a judge from asking questions. Questions during a rebuttal are bad. They lead to a protracted colloquy that might result in a mistake. And a mistake on rebuttal can be fatal. The rebuttal is the last memory the court has of the advocates. A moot court round is never won on rebuttal, but it is sometimes lost on rebuttal.

A moot court rebuttal is not always necessary. In a head-to-head round, if the opponent has done poorly[190] and the team is convinced that the panel has selected it as the winners of the round (based on brief and orals scores), the team should waive rebuttal, even if the team has much to say. No reason exists to continue the argument if the team has won the round. At that point, rebuttal will not help them win the round, but it might cause them to lose it. Waiving rebuttal should be done from the counsel table, not the podium; the judges will be let down if the advocate goes to the podium only to say, given the waiver of rebuttal, that the exercise was a waste of time. If cumulative point scoring is the standard, however, advocates should always rebut—even if they believe they have already won the round—because they

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[186] *See, e.g.*, Wice, *supra* note 119, at 229-30 (advising rebutting counsel to point out opposing counsel's misstatements of law or facts and the inability to answer a question satisfactorily).

[187] *See id.* at 230.

[188] *Cf.,* Stephen J. Dwyer, Leonard J. Feldman & Robert G. Nylander, *Effective Oral Argument: Six Pitches, Five Do's, and Five Don'ts from One Judge and Two Lawyers*, 33 SEATTLE U.L. REV. 347, 356 (2010) ("If you want to be an excellent advocate for your clients, stick to the facts and the law, and don't try to stick it to opposing counsel.").

[189] Moot court differs from real life in many ways. For example, "[i]n real life, all that counts [are] the merits. Real judges do not decide which litigant wins on the basis of which side has the better lawyer." Lebovits II, *supra* note 129, at 1.

[190] *See* Wice, *supra* note 119, at 230 ("If your opponent has totally self-destructed, consider waiving rebuttal altogether or keep your rebuttal to a bare minimum.").

could further increase their point total. The magic words in waiving rebuttal: "Chief Justice/Judge, petitioner respectfully waives rebuttal."

VIII. REFLECTION

It is customary for moot court judges to comment after each round. Whether the comments are supportive or critical, general or specific, the comments often do not reflect the judges' scores. Judges might say that all the advocates did a great job (*e.g.*, "Best round ever"; "I wish lawyers before me in court were this prepared") when, in fact, the judges scored the advocates poorly. Judges might single out advocates who got low scores and commend them and say nothing about the advocates who received the highest scores. Because a judge's comments are not indicative of the scores given the advocates, advocates should not become too pleased or upset from them, or reflexively change what they are doing to reflect them. That said, advocates should not be dismissive, either. Advocates must learn from each round.

Although the atmosphere is more relaxed during a critique than during the moot court round, advocates are expected to continue acting professionally and courteously. This includes refraining from talking back to judges who have negative criticism. Until the judges leave the room, the advocate must be professional.

IX. DEBRIEFING

After the comments have concluded and if time remains, advocates should meet with their coach or teammates and debrief the round. This includes identifying the mistakes the advocates made and the successes that advocates realized during the round. Criticism is healthy because it allows advocates to implement improvements. The mistakes will be fresh in the advocates' memory when they next argue. Coaches share in the joy and in the defeat of their team members, but they should also spur advocates to prepare and adjust for the next round.

A debriefing period also allows advocates to identify the strengths and weaknesses of their opponents' arguments. The advocates might argue the opposing side in a future round. Advocates should use the time between rounds to identify the substantive arguments and gauge the judges' reactions to their presentation. This will serve as a sneak peak, of sorts, of the opposing team's future presentations.

X. THE COACH'S ROLE

Behind every successful moot court team is a dedicated shadow team (which writes a bench brief, moots the student-advocates, and competes in the competition the next year), student coach, faculty advisor, or alumni advisor—or all four in an effective moot court program—who provide vital support at various points of preparation, practice rounds, and the competition. As moot courters prepare for a competition, an effective coach or advisor becomes proactive in making sure that a team is intellectually and logistically prepared. Coaches should ensure that team members submit their briefs on time and complete practice rounds. Coaches should accompany their teams to competitions and help them there. They

should also protest in the event of rule violations, help participants with last-minute refinements to arguments, and make sure that partners that are splitting the work appropriately. Moot courters should list coaches as team members in competitions that allow it; coaches who are team members can work on the brief and sit at counsel table. Coaches should keep the law school's moot court board informed of the team's progress. Coaches should attempt to claim academic credit for their efforts. They should also take photos and video so that the competitors, the Moot Court Board, and the law school can have them later.

The coach should make sure that the law school (not the student) keeps any trophy and that the school keeps the trophy in a prominent place. Good coaches might arrange, however, for the school to pay for a duplicate so that the team members can keep something for their efforts.

Faculty advisors must coach with a light touch, as if they are cheerleaders from the sidelines offering encouragement and suggestions.[191] The cheerleading role is required, not merely by competition rules, which allow only limited faculty assistance, but also by common sense. Faculty advisors ought not dictate how students argue, which students should argue, or in which competitions students should participate, jobs that belong to a student-run moot court board. Doing so interferes with student independence and is counterproductive anyway because the students, not the teachers, write the briefs, deliver the oral argument, and put in the time and effort preparing for and participating in the competition. The professors may be judged on their coaching skills, but only the students should be judged on their advocacy skills.

For a faculty advisor, winning is not the only thing.[192] Although teaching and winning are not always mutually exclusive, when the two collide, teaching is paramount: teaching is more important than winning. To teach, the advisor must emphasize the positive, offer opportunities to learn, and give students real and heartfelt encouragement.

XI. CONCLUSION

This article has attempted to provide moot court competitors with a perspective on the benefits of participating in moot court and a guide to follow in preparing for a moot court competition and winning. Some would-be competitors will advance in competition if they are charismatic and speak well in public, but even they must work hard, practice endlessly, and learn substantive law and the ropes of moot court. In other words, "[t]hose of us without talent for oratory can certainly be effective oral advocates; those who are gifted speakers cannot get by on their gift alone."[193]

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[191] *Contra* Sanford N. Greenberg, *Appellate Advocacy Competitions: Let's Loosen Some Restrictions on Faculty Assistance*, 49 J. LEGAL EDUC. 545 *passim* (1999) (arguing that the competitions' typical limited-assistance rules are often breached and that students would learn more with more faculty help).

[192] For an piece on how to coach a moot court team, see Nancy L. Schultz, *Lessons from Positive Psychology for Developing Advocacy Skills*, *available at* http://ssrn.com/abstract=2007212 (last visited Nov. 20, 2012).

[193] Timothy A. Baughman, Appellate Advocacy, *Effective Appellate Oral Advocacy: "Beauty is Truth, Truth Beauty*," 77 MICH. B.J. 38, 38 (Jan. 1988).

Moot court competitors should remember that a good oral argument in a moot court competition is like a conversation in which an advocate's goal is to convince the court to rule in the team's favor. To accomplish this goal, advocates should prepare a well-organized argument explaining how the court should decide the hypothetical case and why legal authority, policy, and common sense support the proposed ruling. Advocates should view questions from the judges not as interruptions but as insights into concerns that could preclude the judges from ruling in the advocates' favor. Even the best argument can be lost on the listener when presented with distracting body language and gestures, rapid pace, and unprofessional behavior. When a well-structured argument is delivered with appropriate speed, emphasis, and eye contact, and, as in a good conversation, both parties listen and respond courteously to what the other says, the listener becomes more receptive to the speaker, and the speaker's argument becomes more persuasive. The result is an excellent oral argument in which the judge likes the speaker and forgives the speaker's minor mistakes. That increases the student-advocate's chances of winning the competition.

Moot courters should not underestimate the importance of wanting to win. Following the guidelines outlined in this article demands much time and energy, but the effort will pay great dividends to the determined advocate. It will help the determined advocate become a moot court champion, return to the law school with some hardware, and develop important skills that will lead to a successful career as an attorney.

The odds are that the advocate will not win. It is simple math: a dozen teams, and sometimes dozens of teams, but only one winner. Even in the event of a loss, we hope that the advocate will recall the moot court experience with fondness, having had fun and having learned a lot about legal writing and oral advocacy. We hope that the moot court exhilaration will lead to addiction: that the student will sign up for another moot court competition or coach a moot court team and then become a moot court judge upon graduation.

Note to readers: Given the above, the authors respectfully waive rebuttal.

A WINNING MOOT COURT ORAL-ARGUMENT CHECKLIST

Here are the key guidelines that moot court oral advocates should heed closely.[194]

- To increase your chances of winning a moot court competition, attend a law school that has an independent moot court board. The board should have the final say, consistent with its by-laws and the school's budgetary considerations, on who will join the board, who will be officers of the board, in which competitions to compete, and who will compete in them. To win competitions, the law school must offer an

[194] For a fun list of moot court oral-argument do's and don'ts in the Philip C. Jessup International Law Moot Court Competition context, see Inside Justice, *Jessup Moot Court Competition—21 Tips from 21 Judges*, *available at* http://www.insidejustice.com/law/index.php/intl/2009/04/01/jessup_advice_oralists (last visited Nov. 20, 2012) (list of do's); Inside Justice, *Top 21 Reverse Tips for Moot Court Oral Arguments (with commentary)*, *available at* http://www.insidejustice.com/law/index.php/intl/2010/03/11/p243 (last visited Nov. 20, 2012) (list of don'ts).

appellate-advocacy or –skills course that its moot court students can take and which is taught by a faculty member committed to moot court. The school must support its moot court board and its teams with student shadow teams, student coaches, alumni advisors, and faculty advisors. The law school must also (1) award academic credit and writing-requirement satisfaction for competing and coaching; (2) erect trophy-display cases and display trophies and plaques prominently; and (3) confer plenty of moot court awards, including Order of Barristers membership, at commencement. If your law school does not do all these things, fight for them.

- During your time on your moot court board, support your team. Do practice rounds for other board members and attend their competitions. You will learn and develop an ésprit de corps as part of a winning team. When it is your turn to compete, your friends will help you.
- Once you are chosen to compete in a particular competition, read and study the fact pattern as soon as it comes out. Then choose a theme that an intelligent non-lawyer will understand. The theme unifies the issues with the essence of the case and suggests that justice will suffer if the court rules against the advocate.
- Practice oral argument with your teammates before finishing the brief. Practice with non-teammates, too, if the rules do not forbid doing so.
- After the brief is submitted, practice tirelessly before the competition with a variety of judges using a variety of questioning styles—especially tough, aggressive questions.
- Give the practice-round judges good briefs written by your shadow team or by opposing competitors who wrote for the side against which you are arguing.
- Pay attention to the questions asked in practice and further research their answers after the practice round.
- Comply with the competition rules and take advantage of them to earn the maximum score.
- Study the judges' scoring sheet and alter your argument style accordingly.
- Study opposing competition briefs and continue researching until the competition is over.
- Teach your teammates to be great speakers. You are only as good as your weakest teammates. The more you coach your teammates, the more you yourself will learn what a moot court judge appreciates in a moot court advocate.
- Videotape yourself and be ruthlessly self-critical.
- Scope out the moot court room before the argument.
- Stand when the judges enter the room and when they address you—both individually and as a team—during the competition.

- Quietly push in your chair, go to the podium, and await the chief's signal (either verbal instructions or a nod of the head) before beginning.
- Start with a strong and short (sixty-second maximum) introduction and roadmap. You should introduce yourself and co-counsel; ask for rebuttal time; state in one argumentative sentence what co-counsel will argue (not the neutral "my co-counsel will argue the ---- issue") and then what you will argue; offer one to three short sentences giving the determinative facts (not opinions or conclusions) or procedural posture (if relevant); state the relief sought; and give two or three reasons why your team should win on the issue you are arguing.
- Never ask the court whether it wants to hear a brief recitation of the facts or whether it is happy with your answer to a question.
- Never begin with "This case is about . . . ." Although doing so articulates your theme up front, that beginning leads too often to a judge's ruining your roadmap with a hostile question or comment articulating your adversary's theme.
- Speak in simple, plain English, as if talking to a smart high-school student.
- Stay in the moment and focus so that you forget nothing important and not lose your train of thought.
- Speak slowly and conversationally, lower your speaking pitch, and project from the diaphragm.
- Make eye contact with every judge during the entire argument. Look nowhere except at the judges or, quickly, the clerk or bailiff's time card.
- Do not use adverbial excesses like "clearly" and "obviously."
- Do not compliment a judge by saying "That is an excellent question," but you may give a judge a respectful nod to recognize an excellent question.
- Do not say, "As I argued previously" or "With all due respect."
- Smile occasionally. If you cannot smile or if you smile too much, at least do not look dour.
- Do not move about. Keep your feet planted in one place, flat on the ground.
- Do not distract with hand gestures, except to use practiced, theatrical, and very occasional hand gestures like steepling or palms-up (but not down) movements, always at chest level or below, that are consistent with what you are saying. Never point at anyone or tap on the lectern or podium.
- If the record does not address something, tell the judges that the record is silent, but then, if possible, explain why a fair inference from the record supports your point.
- Never, ever read. If you use notes, make them short and in bullet-point form on the inside of a manila file folder cut down to fit on a small lectern or podium. But winning teams avoid using notes. If you do not use notes, make it obvious to the

judges that you are not using notes—such as by slowly buttoning a jacket, slowly pushing in the chair, and slowly walking to the podium while making sure that the judges see hands that are holding nothing.

- Stop immediately to answer a judge's question. Never speak over a judge, except when, over a series of questions, a judge will not let you speak.
- Answer every question, beginning with a "yes" or "no" whenever possible. Then give the reasoning behind the answer and one or two citations to support your answer. If a judge makes a point that contradicts your position, explain why the judge is correct and add a "but" statement.
- Answer multiple questions in some logical order, such as the order in which they were asked.
- Do not repeat a judge's question. Just answer it.
- Welcome questions. Never get defensive.
- Answer questions immediately. Do not tell a judge, "I'll get to it later."
- Know thoroughly the procedural history, the facts of the case, and the applicable appellate standard of review and trial or motion burden of proof.
- Address the other side's contentions, both as the petitioner/appellant and as the respondent/appellee. Seize the nettle as the petitioner/appellant by addressing the respondent/appellee's arguments in advance.
- One good way as the respondent/appellee to rebut the petitioner/appellant's arguments is to note a judge's question to counsel for the petitioner/appellant and explain why you disagree with the petitioner/appellant.
- Cover all major arguments. Addressing the judges' concerns is important but should not be done at the expense of omitting arguments necessary to win.
- Once you answer a question, segue to the next point. There are many ways to transition, including saying something like "And that brings me to my next point."
- Concede fact, law, and argument when doing so does not matter much or when you can argue that you win regardless of the concession. Never concede something important.
- Do not pause after answering a question.
- Avoid lengthy or numerous quotations.
- Do not give the full citation to a case, but simply the name of the court and date of the decision.
- Do not cite a case whose facts you do not know. You must know the details of the cases supporting your most important arguments and your adversary's most important arguments.

- Avoid planned jokes and overblown metaphors. Spontaneous humor at your own expense is acceptable. So is laughing gently at a judge's joke.
- Do not talk or fidget when a team member, an adversary, or a judge is speaking.
- Drink water before approaching the lectern or podium but, if parched, drink while a judge asks a question.
- Remember that oral argument is less about debating than about having a conversation with the judges and addressing their questions so they can rule in your favor.
- Never personally attack or embarrass a moot court adversary. Do not comment on an adversary's minor mistake. Always refer to the opposing party, not the opposing party's counsel.
- Respect the time card. When time is up, thank the panel and sit down or say, "I see that my time is up [or has expired]" (unless the advocate has only half a short sentence left) and ask the chief for permission to answer the question or finish the thought. Advocates should not give a canned conclusion during the argument and especially not after the time card goes up.
- End on a high note, even with a minute or two left, but first say, "And if there are no further questions, thank you."
- Rebut using a moot court approach, not a real-life appellate-advocacy approach. For details, read this article.
- Waive rebuttal (from counsel table, not the lectern or podium) if you won a head-to-head round, but always rebut in a competition involving cumulative scoring.
- Do not slow down or take anything for granted until you win the competition.
- Wholeheartedly want to win. The idea of losing should be mentally and physically painful.
- When you are done competing, coach a team.
- Buy silver polish to show off your winning trophies.
- Return as an alumnus to support your alma mater's moot court program. While at your school in the years following graduation, pause at the moot court trophy display case to glance at your trophy and to recall your moot court days: the best part of your law-school experience.